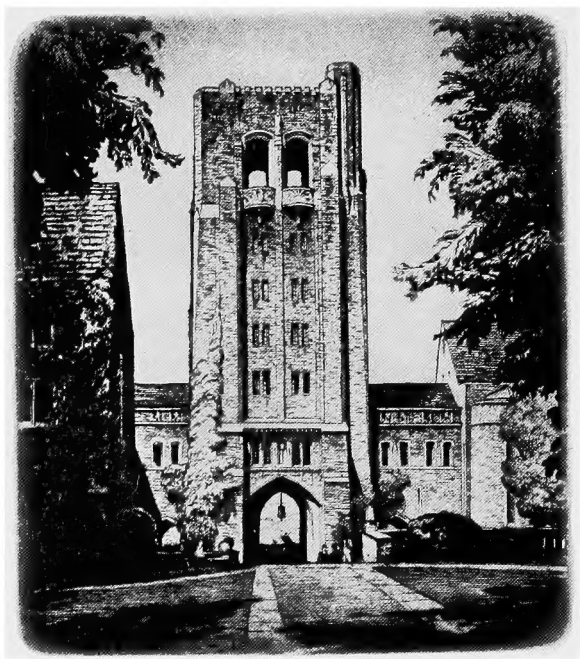




Cornell Law School Library

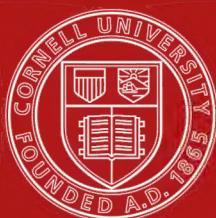
Cornell University Library
KF 810.B16

A treatise on the law of sales of goods,



3 1924 018 824 650

law



Cornell University Library

The original of this book is in
the Cornell University Library.

There are no known copyright restrictions in
the United States on the use of the text.

A TREATISE
ON
THE LAW OF SALES
OF
GOODS, WARES AND MERCHANDISE
AS AFFECTED BY
THE STATUTE OF FRAUDS.

BY
JOHN F. ^{REEMAN}BAKER, LL.B.,
OF THE NEW YORK BAR;
AUTHOR OF
"A TREATISE ON CORPORATIONS," ETC.

CHICAGO:
CALLAGHAN AND COMPANY,
LAW BOOK PUBLISHERS.
1887.

M10263.

COPYRIGHT, 1887,
BY JOHN F. BAKER.

KF
810
B16

DAVID ATWOOD,
PRINTER AND STEREOTYPED,
MADISON, WIS.

TO
THE HONORABLE JOHN F. DILLON,
LATE CIRCUIT JUDGE OF THE UNITED STATES FOR THE EIGHTH
JUDICIAL CIRCUIT, AND FORMERLY CHIEF JUSTICE OF
THE SUPREME COURT OF IOWA,
IN ADMIRATION OF HIS LEGAL ATTAINMENTS AND EMI-
NENT JUDICIAL QUALITIES THIS WORK IS
MOST RESPECTFULLY INSCRIBED
BY
THE AUTHOR.

PREFACE.

From the pen of a writer upon the law of sales as affected by the Statute of Frauds, hardly more, perhaps, should be expected than to present the subject in as clear a light as possible, without embellishment, save by way of illustration.

Notwithstanding the subject has received some attention at the hands of writers on contracts and sales, yet, as one harpist may draw from the instrument an inspiration different from another, so perchance, one writer may touch a chord of harmony in presenting a legal theme which may satisfy beyond those which have preceded.

In the preparation of the following treatise the endeavor has been uppermost throughout, to ascertain the governing principles of the law of sales of personal property, as affected by the Statute of Frauds, and to present those principles in such new lights and connections as to render the work available and valuable alike to the active practitioner and student.

Considerable embarrassment was experienced in reconciling the decisions, due principally to the fact that the Statutes of Frauds of the several states and territories and of England vary in language; but it will be found that the cases have been so grouped and sifted as to illustrate the distinctive differences. The questions of what contracts come within the operation of the statute; of acceptance and receipt; of what constitutes a sufficient note or memorandum; of signature of the parties to be charged; of part payment; of auction sales, and contracts for the sale of crops and growing timber, have all been reviewed and presented, it is believed, with a fair degree of lucidity.

It will be observed that the plan has been quite uniformly followed of stating the facts of the leading English and American cases, and giving the opinions of the courts, in substance, or at some length, thus showing the trend of the decisions, and rendering the work of greater practical utility. Nor have the interesting subjects of the authorship, the history, and the policy of the statute been overlooked.

Inasmuch as there has never been published a work distinctively upon this branch of the law, if the following treatise, supplying a want long felt, shall light the way and facilitate research into a subject as broad and important as any in the wide domain of jurisprudence, the desire of the author to be useful to his fellow-citizens and to the profession will be gratified and his labors amply rewarded.

JOHN F. BAKER.

NEW YORK, November, 1887.

TABLE OF CONTENTS.

CHAPTER I.

	SECTION.
AUTHORSHIP AND HISTORY OF THE STATUTE OF FRAUDS.....	1

CHAPTER II.

OF CONTRACTS WITHIN AND CONTRACTS WITHOUT THE STATUTE OF FRAUDS.....	24
---	----

CHAPTER III.

OF CONTRACTS WITHIN THE STATUTE — RULE OF CONSTRUCTION IN SEVERAL STATES.....	43
--	----

CHAPTER IV.

WHAT CONTRACTS ARE WITHIN THE STATUTE — RULE OF CON- STRUCTION IN ENGLAND.....	72
---	----

CHAPTER V.

OF CONTRACTS WITHOUT THE STATUTE OF FRAUDS.....	96
---	----

CHAPTER VI.

CONCERNING GOODS, WARES AND MERCHANDISE — SHARES OF STOCK AS GOODS.....	136
--	-----

CHAPTER VII.

OF GROWING CROPS AS GOODS AND CHATTELS....	153
--	-----

CHAPTER VIII.

OF GROWING TREES AND TIMBER AS GOODS AND CHATTELS.....	178
--	-----

CHAPTER IX.

OF CONTRACTS FOR THE SALE OF GROWING TREES AND TIMBER, WHEN TO BE REMOVED BY THE VENDEE.....	190
---	-----

CHAPTER X.

SECTION.

CONCERNING LICENSE IN THE VENDEE TO REMOVE TREES AND TIMBER.....	199
---	-----

CHAPTER XI.

CONCERNING ICE AS GOODS.....	213
------------------------------	-----

CHAPTER XII.

CONCERNING PRICE OR AMOUNT.....	217
---------------------------------	-----

CHAPTER XIII.

OF ACCEPTANCE AND RECEIPT — ACCEPTANCE.....	244
---	-----

CHAPTER XIV.

OF ACCEPTANCE AND RECEIPT — RECEIPT AND DELIVERY.....	283
---	-----

CHAPTER XV.

OF CONTRACTS FOR THE SALE OF GOODS BY SAMPLE.	309
--	-----

CHAPTER XVI.

OF SYMBOLICAL AND CONSTRUCTIVE DELIVERY.....	326
--	-----

CHAPTER XVII.

OF CONDITIONAL SALES.....	333
---------------------------	-----

CHAPTER XVIII.

OF RECEIPT OF GOODS BY CARRIER.....	339
-------------------------------------	-----

CHAPTER XIX.

OF EARNEST AND PART PAYMENT.....	359
----------------------------------	-----

CHAPTER XX.

OF THE NOTE OR MEMORANDUM IN WRITING.....	396
---	-----

CHAPTER XXI.

OF THE NOTE OR MEMORANDUM IN WRITING — CONTRACTS BY TELEGRAPH	453
--	-----

CHAPTER XXII.

CONCERNING THE SIGNATURE OF THE PARTIES TO BE CHARGED...	464
--	-----

CHAPTER XXIII.

	SECTION.
OF THE PERSON LAWFULLY AUTHORIZED TO SIGN THE NOTE OR MEMORANDUM.....	485

CHAPTER XXIV.

OF SALES BY BOUGHT AND SOLD NOTES.....	503
--	-----

CHAPTER XXV.

OF AUCTION SALES AND AUCTIONEERS.....	515
---------------------------------------	-----

CHAPTER XXVI.

OF AUCTION SALES AND AUCTIONEERS—CONCERNING THE RE- TRACTION OF A BID.....	567
---	-----

CHAPTER XXVII.

OF PLEADING THE STATUTE OF FRAUDS	582
---	-----

CHAPTER XXVIII.

OF LAW OF PLACE OF THE CONTRACT, AS AFFECTED BY THE STATUTE OF FRAUDS.....	603
---	-----

APPENDIX I.

	PAGE.
THE STATUTE OF FRAUDS, AS TO SALES OF GOODS, WARES AND MERCHANDISE, CHATTELS AND THINGS IN ACTION, AND PERSONAL PROPERTY, OF THE SEVERAL STATES AND TERRITORIES.....	493

APPENDIX II.

THE ENGLISH STATUTE OF FRAUDS, § 17, AND LORD TENTERDEN'S ACT, SO FAR AS IT RELATES TO THE STATUTE 29 CAR. II., AS TO GOODS, WARES AND MERCHANDISE.....	510
---	-----

TABLE OF CASES.

FIGURES REFER TO SECTIONS.

A.

- Abbott v. Gilchrist, 29, 38, 59, 77, 106, 114.
 Abbott v. Shepard, 572.
 Acebel v. Levy, 227, 253, 344, 609.
 Ackerman v. Ackerman, 133a.
 Acraman v. Morrice, 269.
 Adams v. Farr, 337.
 Adams v. Foley, 327.
 Adams v. Lindsell, 457, 569.
 Adams v. O'Connor, 336.
 Adams v. Patrick, 590.
 Adlard v. Booth, 100.
 Albion F. & L. Ins. Co. v. Mills, 609.
 Alderton v. Buchoz, 326.
 Aldrich v. Pyatt, 238.
 Aldridge v. Johnson, 270.
 Alexander v. Comber, 21, 120, 365.
 Alford v. Baker, 390.
 Allard v. Greasert, 235, 312, 355.
 Allen v. Aquria, 366.
 Allen v. Bennett, 410, 418, 447, 450, 553.
 Allen v. Jarvis, 41, 112.
 Allis v. Read, 366, 372.
 Alna v. Plummer, 548.
 Alves v. Nodgson, 607.
 Ames v. Quimby, 232.
 Amson v. Dreher, 277, 285, 303.
 Andrews v. Dietrich, 330.
 Andrews v. Hoover, 126.
 Appleton v. Bancroft, 267.
 Argenbright v. Campbell, 466.
 Armstrong v. Houston, 337.
 Armstrong v. Turner, 263.
 Arrington v. Larribee, 209.
 Artcher v. Zeh, 253, 361, 384.
 Ash v. Abdy, 8.
 Ashcom v. Smith, 578.
 Ashcroft v. Butterworth, 444.
 Ashcroft v. Morrin, 223, 449.
 Astey v. Emery, 21, 46, 77, 83, 85.
 Atherton v. Newhall, 268, 340, 368.
 Atkinson v. Bell, 74, 78, 93, 112.
 Attorney-General v. Belle Isle Ice Company, 213.
 Atwater v. Hough, 41.
 Atwell v. Miller, 429, 444.
 Atwood v. Cobb, 403, 410, 425.
 Atwood v. Lucas, 248, 311.
 Audenried v. Randall, 326.
 Austin v. Boyd, 585.
 Austin v. Sawyer, 165, 167.
 Avery v. Stewart, 299.
 Avery v. Wilson, 297.

B.

- Babcock v. Meek, 586, 601.
 Babcock v. Utter, 180, 208.
 Bach v. Owen, 361.
 Bacon v. Eccles, 246, 259, 282, 344, 357, 411.
 Bailey v. Clason, 490.
 Bailey v. Epperly, 283.
 Bailey v. Ogden, 299, 306, 502.
 Bailey v. Schell, 215.
 Bailey v. Sweeting, 399, 428.
 Baily v. Hudson River R. R. Co. 278.

- Baker v. Bourcicault, 105.
 Baker v. Dening, 480.
 Baker v. Farmbrough, 382.
 Baker v. Henderson, 164.
 Baker v. Jameson, 573.
 Baldey v. Parker, 11, 21, 235, 236,
 271, 285, 344, 355, 541.
 Baldwin v. Williams, 137, 147, 150,
 152.
 Baltzen v. Nicolay, 147, 488.
 Bamber v. Savage, 581.
 Banton v. Shorey, 180, 212.
 Banker v. Hoyt, 512.
 Bank of Lansingburg v. Crary, 173,
 192, 196.
 Bank of Br. N. A. v. Simpson, 419.
 Banks v. Harris Manufacturing
 Co., 438.
 Baptist Church v. Insurance Co.,
 293.
 Barclay v. Bates, 581.
 Barkalow v. Pfeiffer, 247, 283.
 Barkley v. Rensselaer, etc., Rail-
 road Co., 280, 341.
 Barlow v. Ocean Ins. Co., 168.
 Barnes v. Jevons, 261.
 Barnett v. Nye, 103.
 Barney v. Brown, 332, 341.
 Barstow v. Gray, 403, 422.
 Barry v. Combe, 477, 480.
 Barrett v. Goddard, 264.
 Bartlett v. Brunell, 495.
 Bass v. Veltorn, 232.
 Basford v. Pearson, 4, 419.
 Bates v. Chesebro, 376.
 Bates v. Coster, 68.
 Batters v. Sellers, 466, 491, 540.
 Baylis v. Lundy, 282a.
 Beach v. Raritan & Delaware Bay
 R. R. Co., 454.
 Beaumont v. Bungeri, 263.
 Bean v. Burbank, 403.
 Beckley v. Keenan, 480.
 Beckwith v. Talbot, 405, 426, 446,
 473, 478.
 Beers v. Crowell, 147.
 Beirne v. Dord, 258.
 Bellus v. Keyser, 405.
 Bement v. Smith, 113.
 Bennet v. Brumfith, 480.
 Bennett v. Hall, 487.
 Bennett v. Hull, 15, 28, 83.
 Bent v. Cobb, 485, 494, 534, 548.
 Benton v. Pratt, 135.
 Bensley v. Bignold, 89.
 Bernal v. Hovious, 156, 162.
 Bethel Steam Mill Co. v. Brown,
 327.
 Bexwell v. Christie, 558.
 Bigler v. Hall, 26.
 Bill v. Bament, 307, 332, 399, 465.
 Billin v. Henkel, 345.
 Bird v. Boulton, 531.
 Bird v. Muhlenberg, 67, 69.
 Bird v. Monroe, 403, 425, 438.
 Bishop v. Bishop, 158.
 Bissell v. Balcom, 262, 264, 363, 377.
 Blackford v. Preston, 557.
 Blagden v. Bradbear, 18, 518.
 Blake v. Nicholson, 91.
 Blanchard v. Page, 348.
 Blanchard v. Trim, 301.
 Bleeker v. Franklin, 465, 573.
 Blenkinsop v. Clayton, 361.
 Blood v. Hardy, 494.
 Bloom v. Welsh, 156.
 Blossom v. Milwaukee & Chicago
 R. R. Co., 572.
 Boardman v. Cutter, 137, 144, 150.
 Boardman v. Spooner, 286, 411, 465,
 480.
 Bodkin v. Merit, 583.
 Bog Lead Mining Co. v. Montague,
 276, 316.
 Bold v. Raymer, 505.
 Bommer v. Am. Spiral Spring Butt
 Hinge Mfg. Co., 587.
 Bordwell v. O'Keefe, 293.
 Borrowscale v. Bosworth, 256, 310.
 Bossinger v. Spangler, 329.
 Bostwick v. Leach, 156.
 Bours v. Webster, 162.
 Bowers v. Anderson, 252, 264.
 Bowes v. Pontiflix, 282a.

- Bowlby v. Bell, 14, 139.
 Bowman v. Conn, 115.
 Bowser v. Cessna, 578.
 Boyce v. Washburn, 186.
 Boyd v. Eaton, 107, 477.
 Boyden v. Crane, 4, 419.
 Boynton v. Veazie, 332.
 Bozza v. Rowe, 573.
 Brabin v. Hyde, 285, 362, 385.
 Brace v. Yale, 216.
 Bradford v. Spiker, 403.
 Bradley v. Holdsworth, 139.
 Brady v. Harrahy, 384.
 Bramley v. Alt, 558.
 Brandt v. Focht, 274, 284, 311.
 Bray v. Kittell, 494.
 Breckinridge v. McAfee, 563.
 Brent v. Green, 548.
 Brewster v. Taylor, 247, 274, 309.
 Bricker v. Hughes, 165.
 Briggs v. Munchon, 414, 531.
 Briggs v. Partridge, 481.
 Britain v. McKay, 166.
 Brock v. Jones, 573.
 Brock v. Knower, 311.
 Bronson v. Wiman, 58*a*, 187.
 Brooks v. Minturn, 405.
 Brown v. Allen, 33, 397.
 Brown v. Bellows, 233.
 Brown v. Cheesney, 516.
 Brown v. Clark, 27.
 Brown v. Cole, 232.
 Brown v. George, 118.
 Brown v. Hall, 237, 262, 423.
 Brown v. Sanborn, 63, 72, 405, 416,
 436.
 Brown v. Whipple, 425, 433, 443.
 Browne v. Hare, 270.
 Browning v. Magill, 563.
 Brownson v. Chapman, 147.
 Bruce v. Bishop, 572.
 Buck v. Pickwell, 170, 198, 210.
 Buckeridge v. Ingram, 10.
 Buckingham v. Osborne, 261.
 Buckley v. Beardsle, 440.
 Buckmaster v. Harrop, 518.
 Buffington v. Curtis, 164.
 Bulger v. Roche, 607.
 Bullard v. Waite, 263, 267.
 Bullock v. Stcherge, 245, 275, 347.
 Bundy v. Johnson, 463.
 Bunting v. Beideman, 594.
 Burges v. Wickham, 411.
 Burke v. Haley, 448, 548.
 Burke v. Partridge, 147.
 Burnham v. Dunn, 168.
 Burrell v. Root, 476.
 Burrill v. Tuessell, 8.
 Burski v. Paige, 129.
 Burton v. Scherpf, 211.
 Bush v. Holmes, 248, 309.
 Bushell v. Annaman, 317.
 Bushell v. Wheeler, 258, 332, 344.
 Busk v. Davis, 230.
 Butler v. Thomson, 485, 506, 508,
 536.
 Buxton v. Bedal, 80.
 Buxton v. Rust, 432.
 Bryant v. Crosby, 170, 176.
 Bryant v. Witcher, 563.
 Byassee v. Reese, 180.
 Byers v. Franklin Coal Co., 215.
 Byles v. Collier, 418.
 Byrne v. Van Tienhoven, 549.

 C.
 Cabot v. Haskins, 422, 470.
 Cahill v. Bigelow, 583.
 Cain v. Leslie, 308.
 Calcutta Co. v. De Mattos, 270, 334.
 Caldwell v. Green, 412.
 Calkin v. Falke, 425.
 Calkins v. Lockwood, 330.
 Cameron v. Fowler, 197.
 Campbell v. Campbell, 374.
 Campbell v. Clark, 528.
 Campbell v. Mersey Docks Com-
 pany, 269.
 Carman v. Smick, 120.
 Carpenter v. Clark, 288.
 Carpenter v. Graham, 275.
 Carr v. Duval, 572.
 Carrington v. Roots, 156.
 Carter v. Harlan, 208.

- Carter v. Touissaint, 285, 332.
 Carter v. Willard, 267.
 Cartwright v. Phoenix, 326.
 Carver v. Lane, 326.
 Cary v. Hotaling, 563.
 Case v. St. Catharines Opera House Co., 132.
 Cason v. Cheely, 25, 65, 76, 168.
 Castle v. Sworder, 246, 263, 317, 353.
 Catlin v. Tobias, 297.
 Catling v. King, 543.
 Caton v. Caton, 477.
 Caulkins v. Hellman, 247, 258, 278, 292, 312, 326a, 341, 357.
 Cayuga County Nat. Bank v. Daniels, 343.
 Chaffin v. Doud, 256.
 Chamberlain v. Smith, 181.
 Chamberlin v. Dow, 357.
 Chambers County v. Clews, 600.
 Champin v. Plummer, 410, 418, 447, 450, 456, 502.
 Champlin v. Layton, 566.
 Champlin v. Parish, 475.
 Chanter v. Dickinson, 143, 148.
 Chaplin v. Rogers, 11, 21, 261, 306, 330, 602.
 Chapman v. Langdon, 411.
 Chapman v. Partridge, 546.
 Chapman v. Searle, 253, 262.
 Chapman v. Shepard, 298.
 Chappel v. Marvin, 330.
 Chase v. Willard, 332.
 Chater v. Beckett, 129.
 Chinnock v. Sainsberry, 572.
 Chicago Dock Co. v. Kenzie, 583.
 Chichester v. Cobb, 477.
 Christie v. Burnett, 414, 420.
 Church v. Brown, 225, 433.
 Church v. Wells, 525.
 Churchill v. Wilkins, 223.
 Citizens' Bk. v. Nantucket Steamboat Co., 137.
 City Bank v. Rowe, W. & O. R. Co., 343.
 Claffin v. Carpenter, 183, 206, 212.
 Claffin v. Rosenberg, 329.
 Clark v. Draper, 326.
 Clark v. Labreche, 262, 271.
 Clark v. Terry, 596.
 Clark v. Wright, 247.
 Clark v. Woodruff, 481.
 Clark v. Nichols, 33, 64, 189.
 Clarke v. Westrope, 241.
 Clarkson v. Carter, 366.
 Clarkson v. Noble, 247, 537, 546.
 Clason v. Bailey, 440, 467, 483.
 Clay v. Yates, 32, 73, 77, 78, 88, 89, 90.
 Clayton v. Andrews, 15, 69, 80, 82, 83, 86.
 Cleaves v. Foss, 522, 575.
 Clegg v. Levy, 607.
 Cloud v. Monman, 298.
 Clute v. Steele, 288.
 Coate v. Terry, 523.
 Coats v. Chaplin, 344.
 Cobb v. Arundell, 353.
 Cocks v. Izard, 554.
 Cochran v. Willis, 231.
 Coddington v. Goddard, 425, 446, 466, 471, 497, 504.
 Codran v. Toher, 302.
 Coffman v. Hampton, 235, 541.
 Colgreve v. Solomon, 193.
 Cole v. Swanston, 512.
 Cole v. Brown, 475, 570.
 Coles v. Clark, 299.
 Coleman v. Eyre, 114, 128, 147.
 Coleman v. Gibson, 219, 282, 282a.
 Collins v. Blantern, 23.
 Colt v. Netterville, 140.
 Colton v. Lee, 450.
 Colvin v. Williams, 144, 146.
 Combs v. Bateman, 390.
 Commonwealth v. Jeffries, 456.
 Connor v. Giles, 337.
 Connor v. Hingtgen, 598.
 Conway v. Edwards, 263, 288.
 Cook v. Bradley, 151.
 Cook v. Mann, 286, 329.
 Cook v. New York Central R. R. Co., 513.
 Cook v. Oxley, 569.

- Cook v. Stearns, 200, 205.
 Cooke v. Millard, 43, 47, 48, 50, 52, 56, 269, 303.
 Cooke v. Reddelien, 529.
 Cooke v. Tombs, 129.
 Cool v. Peters Box & Lumber Co., 207.
 Coombs v. Bristol & Ex. R. R. Co., 317, 344, 349.
 Coombs v. Gordon, 563.
 Coon v. Riglen, 427, 465.
 Cooper v. Carlisle, 133a.
 Cooper v. Elston, 15, 28, 65, 69, 77, 83, 248, 310.
 Corbitt v. Salem Gaslight Co., 243.
 Cormick v. Drummatt, 583.
 Cornell v. Clark, 284, 307.
 Corning v. Colt, 257.
 Cotterill v. Stevens, 285, 329.
 Courtright v. Stewart, 122.
 Cox v. Baker, 525.
 Cox v. Painter, 435.
 Cozine v. Graham, 586, 592.
 Craig v. Godfrey, 528, 531.
 Crawford v. Morrell, 129.
 Crawford v. Smith, 130.
 Creager v. Link, 572.
 Crockett v. Scribner, 29, 33, 59, 114.
 Crofoot v. Bennett, 328.
 Crookshank v. Burrell, 15, 48, 74, 103, 106, 487.
 Croppe v. Cook, 446.
 Crosby v. Wadsworth, 156, 171, 192.
 Cross v. Eglin, 223.
 Cross v. O'Donnell, 274, 340, 353, 355.
 Crotenkemper v. Achtemeyer, 549.
 Crowder v. Austin, 557.
 Crull v. Dodson, 141.
 Cuddee v. Rutter, 140.
 Cumming v. Roebuck, 503.
 Cummings v. Arnold, 301, 405, 451.
 Cummings v. Barrett, 214.
 Cummings v. Dennett, 38, 77, 242, 403, 440.
 Cummings v. Stone, 591.
 Cunliffe v. Harrison, 282a.
 Cunningham v. Ashbrook, 232, 368.
- Currie v. Anderson, 282a, 317, 344.
 Curtis v. Pugh, 253, 282a.
 Cusack v. Robinson, 258, 272, 316, 353.
 Cushing v. Breed, 298.
 Cushing v. Warrick, 27.
 Cutler v. Pope, 174, 176.
- D.
- Dabovich v. Ermeric, 582.
 Dacosta v. Davis, 606.
 Dallard v. Potts, 499.
 Dalton v. Solomon, 339.
 Dame v. Baldwin, 563.
 Damon v. Osborn, 328, 373.
 Danforth v. Walker, 248, 311.
 Daniel v. Harley, 581.
 Daniel v. Wood, 525.
 Daniels v. Bailey, 195.
 Dant v. Fielder, 415.
 Davis v. Eastman, 309.
 Davis v. Emery, 212.
 Davis v. Moore, 404.
 Davis v. McFarlane, 163.
 Davis v. Robertson, 519.
 Davis v. Rowell, 520.
 Davis v. Shields, 468, 474, 475.
 Davis v. Spencer, 386.
 Dawes v. Peck, 343, 344.
 Day v. New York Cent. R. R. Co., 4, 419.
 Day v. Pool, 368.
 Day v. Wells, 573.
 Deal v. Maxwell, 60, 109, 110.
 De Birt v. Thompson, 471.
 Dedrich v. Leonard, 250.
 Dehority v. Paxson, 247, 287.
 Delaney v. Root, 156.
 Delaware & Hudson Canal Co. v. Penn. Coal Co., 232.
 Den v. Zellers, 562, 564.
 Denmead v. Glass, 247, 344.
 Dennison v. Carnahan, 263, 501.
 Denny v. Williams, 256, 326, 326a.
 Denton v. Great Northern R'y Co., 562.

Derew v. Daverill, 527.
 Detroit, Hills. & Ind. R. R. v.
 Forbes, 118.
 Dewey v. Williams, 285.
 Dickenson v. Dickenson, 338.
 Dickenson v. Silwot, 513.
 Dickson v. Lambert, 593.
 Dilke v. Andrews, 341.
 Dilton v. Anderson, 439.
 Dilworth v. Bostwick, 454, 495.
 Dimmock v. Hallock, 556.
 Dimmock v. Lockwood, 131.
 Dixon v. Yates, 17, 283.
 Doak v. Burbaker, 288.
 Dobell v. Hutchinson, 429.
 Dodsley v. Varley, 272, 332.
 Doe v. Harris, 10.
 Doggett v. Emerson, 566.
 Dole v. Stimpson, 274.
 Donaldson v. Newman, 584.
 Donegani v. Molinelli, 96.
 Donnell v. Hearn, 96, 110, 113.
 Donovan v. Willson, 58, 58a, 77, 97.
 Dooley v. Erlbert, 289, 363.
 Doolin v. Ward, 554.
 Doty v. Martin, 119.
 Doughty v. Manhattan Brass Co.,
 429.
 Douglass v. Garrett, 329.
 Douglass v. Spears, 423a, 447.
 Dow v. Worthen, 383.
 Dows v. Montgomery, 258, 314.
 Downer v. Thompson, 281, 330.
 Downs v. Ross, 29, 45, 48, 64, 74,
 75, 76, 103, 467.
 Doyle v. Dixon, 143.
 Doyle v. Lasher, 332.
 Drake v. Wells, 208.
 Draper v. Jones, 230.
 Draper v. Pattina, 480.
 Drefolt v. Gorman, 63.
 Dressel v. Jordan, 410, 422, 423a.
 Drury v. Young, 424, 465, 477,
 Dudley v. Abner, 336.
 Dudley v. Jamaica P. Aqueduct,
 215.
 Duffy v. O'Donovan, 588.

Duncan v. Blair, 107.
 Duncroft v. Albrecht, 148.
 Dung v. Parker, 134.
 Dunlop v. Lambert, 348.
 Dunning v. Roberts, 454.
 Dunne v. Ferguson, 154, 180.
 Duplex Safety Boiler Co. v.
 McGuinness, 257, 285.
 Durkee v. Vermont Central R. R.,
 454.
 Durrell v. Evans, 472.
 Dyas v. Stafford, 553.
 Dyer v. Libby, 256, 307.
 Dykers & Alstyne v. Townsend,
 435, 500, 523.

E.

Easterlin v. Rylander, 232.
 Eden v. Blake, 443.
 Easton v. Worthington, 563.
 Ecroyd v. Davis, 577, 581.
 Edin v. Dudfield, 285, 327.
 Edgerton v. Hodge, 362.
 Edgerton v. Huff, 214.
 Edwards v. Grand Trunk R'y Co.,
 38, 96, 170, 181, 247, 286, 344.
 Egerton v. Matthews, 26, 242, 447,
 450, 469.
 Eggleston v. N. Y., etc., Railroad
 Co., 208.
 Ehle v. Judson, 197.
 Eichelberger v. McCauley, 41, 74,
 82, 87, 116.
 Eiseley v. Malchow, 583.
 Elliott v. Dean, 425, 428.
 Elliott v. Jenness, 582.
 Elliott v. Peterson, 176.
 Ellis v. Bray, 408, 414.
 Ellis v. Clark, 212.
 Ellis v. Hunt, 330.
 Ellis v. Smith, 479.
 Ellison v. Brigham, 183, 203.
 Ellison v. Jackson, 242.
 Elmendorf v. Taylor, 608.
 Elmore v. Kingscote, 223.
 Elmore v. Stone, 21, 257.

- Elphick v. Barnes, 337.
 Ely v. Ormsby, 262, 267, 362, 384.
 Emmerson v. Heelis, 158, 170, 235, 236, 522, 541, 550, 569, 581.
 Ennis v. Waller, 518.
 Erskine v. Plummer, 181, 205.
 Estey v. Cooke, 288.
 Evans v. Hardy, 180.
 Evans v. Harris, 262.
 Evans v. Roberts, 111, 156, 160, 169, 173.
 Evans v. Wills, 547.
 Everett v. Parks, 353.
 Ewing v. Bennet, 27.
 Eyston v. Studd, 27.
 Ex parte Safford—Re Downing, 249.
 Ex parte Parker, 275.
- F.
- Fagan v. Faulkner, 229.
 Farebrother v. Simmons, 494, 535.
 Farina v. Home, 341, 344.
 Farmer v. Gray, 265a.
 Farmer v. Horne, 332.
 Farmer v. Robinson, 573.
 Farr v. Dutcher, 133a.
 Farren v. O'Hara, 29, 58.
 Farwell v. Tillson, 582.
 Fawkes v. Lamb, 411.
 Fawcett v. Glossop, 247.
 Fay v. Wheeler, 146, 338.
 Fenley v. Stewart, 436.
 Fenn v. Harrison, 488.
 Fernier v. Home.
 Fessenden v. Mussey, 465, 525, 531, 581.
 Fickett v. Swift, 96.
 Fine v. Hornsby, 137, 145.
 Finney v. Apgar, 37, 96, 248, 274.
 First Baptist Church of Ithaca v. Bigelow, 117, 524.
 First National Bank of Springfield v. Dana, 513.
 Fish v. Hubbard's Adm'r, 459.
 Fisher v. Forbes, 158.
- Fisher v. Hersey, 561, 570.
 Fisher v. Leitzer, 572.
 Fiske v. McGregory, 536, 539.
 Fitzpatrick v. Woodruff, 147.
 Fitzsimmons v. Woodruff, 61, 109, 368.
 Flagg v. Mann, 217, 586.
 Flanders v. Maynard, 375.
 Flanagan v. Demorest, 297.
 Fluckner v. United States Bank, 366.
 Fletcher v. Ingram, 282.
 Flint v. Corbitt, 60.
 Flintoft v. Elmore, 530, 535, 548.
 Foley v. Mason, 415.
 Forsyth v. Jervis, 384.
 Foster v. Leeper, 126.
 Foster v. Rockwell, 353.
 Foster v. Ropes, 335, 418.
 Foster v. Steele, 441.
 Fowler v. Hollins, 494.
 Fox, *In re*, 139.
 Fragano v. Long, 270.
 Francois v. Ocks, 123.
 Frank v. Harrington, 28, 159, 161.
 Frazee v. Moffit, 215.
 Freeman v. Underwood, 212.
 Freeport v. Bartol, 117, 525.
 Friend v. Pettingill, 114.
 French v. Freeman, 248, 263.
 Frost v. Hill, 535.
 Frostburg Mining Co. v. New Eng. Glass Co., 327, 353.
 Fuller v. Abrahams, 556.
 Fuller v. Bean, 222, 232, 336.
 Fuller v. Reed, 107.
 Fuller v. Rice, 591.
 Futches v. Futches, 584.
- G.
- Gadsden v. Lauer, 146.
 Gale v. Wells, 513.
 Gallagher v. Brunel, 135.
 Galloway v. Week, 275.
 Galton v. Enniss, 555.
 Gano v. The Chicago & Northwestern Railroad Co., 252.

- Garbutt v. Watson, 15, 32, 41, 46,
 74, 77, 83, 86, 103.
 Gardet v. Belknap, 254, 284.
 Gardner v. Grout, 311.
 Gardner v. Hazelton, 411.
 Gardner v. Joy, 35, 53, 78, 189.
 Gardner v. Morse, 554.
 Garfield v. Paris, 245, 256, 311.
 Gartrell v. Stafford, 410.
 Gary v. Hull, 131.
 Gaslin v. Pinney, 261, 282*a*, 287.
 Gates v. Shatts, 168.
 Gault v. Brown, 235.
 Gaylord Mfg. Co. v. Alen, 368.
 Geary v. Physic, 480.
 Georgia Refining Co. v. The Au-
 gusta Oil Co., 126.
 Gerard v. Taggart, 539.
 Getchell v. Jewett, 403, 410, 423*a*,
 425.
 Gibbs v. Benjamin, 248, 286, 336,
 341.
 Gibbs v. Usher, 137.
 Gibson v. Holland, 399, 403, 424.
 Giles v. Simonds, 181.
 Gill v. Bicknell, 575.
 Gill v. Hewitt, 531.
 Gillespie v. Elmonston, 457.
 Gilliat v. Gilliat, 556.
 Gillighan v. Boardman, 403.
 Gillitt v. Hill, 269.
 Gillitt v. Maynard, 131.
 Gilman v. Hill, 38, 49, 235, 252, 285,
 315, 384.
 Gilmour v. Supple, 334.
 Givins v. Calder, 596.
 Glenn v. Rogers, 583.
 Goddard v. Binney, 29, 33, 39, 48,
 59, 77, 96, 105, 114, 279.
 Goddard v. Demeritt, 247, 344.
 Godeffroy v. Caldwell, 114.
 Goelet v. Cowdrey, 530, 581.
 Gooch v. Holmes, 137, 147.
 Goodall v. Skelton, 361.
 Gooding v. Riley, 179.
 Goodwin v. Francis, 454, 463, 491.
 Goodyear v. Walliston, 162.
 Gordon v. Simonton, 282.
 Gordon v. Sims, 548.
 Gorham v. Fisher, 29, 185, 315.
 Gorm v. Aflats, 496.
 Goshen v. Kern, 516.
 Gould v. Town of Oriconta, 370.
 Governor, etc., v. Patch, 439.
 Gowing v. Knowles, 572.
 Graff v. Foster, 584.
 Grafton v. Armitage, 88, 92.
 Grafton v. Cummins, 410, 446.
 Grand Chute v. Winegar, 600.
 Grant v. Fletcher, 503, 513.
 Grant v. Naylor, 506.
 Graves v. Weld, 156, 157.
 Gray v. Baker, 117.
 Gray v. Davis, 257, 262, 314, 326, 330.
 Gray v. Harper, 415.
 Gray v. Sullivan, 288.
 Gray v. Veers, 560.
 Green v. Armstrong, 173, 192, 204.
 Green v. Haythorn, 311.
 Green v. Merriam, 263, 267.
 Green v. Richards, 374, 582.
 Greene v. Bateman, 231, 579.
 Greene v. Lewis, 400.
 Greeley-Burnham Grocer Co. v.
 Capen, 509.
 Greely v. Stilson, 205, 206.
 Grey v. Cary, 354.
 Grice v. Hendrick, 556.
 Griffith v. Fowler, 563.
 Grimes v. Van Vechten, 350, 353,
 357.
 Groat v. Gill, 362.
 Groom v. Affalo, 504, 513.
 Groot v. Story, 419, 443.
 Groover, Stubbs & Co. v. Warfield,
 126.
 Grover v. Cameron, 281.
 Groves v. Buck, 15, 69, 74, 80, 83.
 Gunnis v. Erhart, 566.
 Gurney v. Atlantic, etc., Railway
 Co., 258.
 Gurney v. Collins, 405.
 Gwathney v. Cason, 411, 581.
 Gyger's Estate, 27.

H.

- Hakes v. Hotchkiss, 443.
 Hall v. Soule, 405.
 Hallen v. Runder, 111.
 Hallenbeck v. Cochran, 250.
 Hallock v. Commercial Ins. Co., 455.
 Halterline v. Rice, 252.
 Hamilton v. Calhoun, 303.
 Hanson v. Armitage, 252, 268, 332, 344, 350, 449.
 Hanson v. Meyer, 299.
 Hanson v. Roter, 291, 330.
 Hardell v. McClure, 25, 64, 74, 75, 291.
 Harman v. Reeve, 14, 219.
 Harnson v. Elvin, 430.
 Harper v. Miller, 592, 594.
 Harris v. Frink, 180, 211.
 Harris v. Nickerson, 565.
 Hart v. Bush, 341, 344.
 Hart v. Hammett, 415.
 Hart v. Suttley, 268, 344.
 Harteau v. Gardner, 294.
 Harvey v. Harris, 581.
 Harvey v. Stevens, 424, 548.
 Haskell v. Ayers, 206.
 Hatch v. Lincoln, 332.
 Hatton v. Cave, 2.
 Hausman v. Nye, 258, 286, 309, 349, 541.
 Hawes v. Foster, 504.
 Hawkins v. Baker, 487, 573.
 Hawkins v. Chace, 466, 471, 472, 494.
 Hawley v. Keeler, 252, 261, 362, 370, 389.
 Hayden v. Demets, 326, 332.
 Hayden v. Steadman, 586, 591.
 Haynes v. Cutchford, 554.
 Haynes v. Nice, 107, 476.
 Hazard v. Day, 454, 456.
 Hazel v. Dunham, 557.
 Head v. Diggon, 574.
 Hedges v. Strong, 536.
 Heermance v. Taylor, 253.
 Heideman v. Wolfenstein, 409, 509, 531.
 Henderson v. Cotter, 411, 443.
 Henderson v. State, 494.
 Henkel v. Pape, 454.
 Henline v. Hall, 130.
 Heritage v. Hall, 314.
 Herring v. Hoppock, 337.
 Heseltine v. Siggers, 139.
 Hewes v. Jordan, 248, 253, 258, 271, 285, 309.
 Heyman v. Neale, 504, 573.
 Heyworth v. Knight, 446.
 Hibblewhite v. McMorine, 76, 139.
 Hicks v. Hawkins, 488.
 Hicks v. Minturn, 516, 527.
 Hicks v. Whitmore, 518, 521, 526, 528, 531.
 Hickok v. Buell, 275.
 Hight v. Ripley, 29, 40, 53, 58a.
 Higdon v. Thomas, 465.
 Higgins v. Chessman, 418.
 Higgins v. Kusterer, 216.
 Higgins v. Murray, 28, 98, 99, 113.
 Higgins v. Senior, 405, 435.
 Hill v. McDonald, 259, 282.
 Hill v. Miller, 431.
 Hill v. Spear, 608.
 Hillebrands v. Nebbelink, 193.
 Hinckley v. Arey, 494.
 Hinde v. Whitehouse, 18, 252, 311, 496, 504, 518, 618, 526.
 Hoadley v. McLaine, 219, 224, 415.
 Hobbs v. Wetherswax, 107, 129, 180.
 Hodgson v. Le Bret, 236, 541.
 Hoffman v. Anthony, 549.
 Hoffman v. Carow, 533.
 Hoffman v. King, 275, 282, 299.
 Hogar v. King, 338.
 Hoit v. Stratton Mills, 179.
 Holden v. Jackson, 564.
 Hollenbecker v. Napier, 264.
 Hollingsworth v. Napier, 314.
 Holmes v. Haskins, 344.
 Holmes v. Holmes, 555.
 Home v. Hayward, 359.
 Hook v. Turner, 554, 584.
 Hooker v. Knab, 62, 248, 344, 390.
 Hopton v. McCarthy, 258, 280.

Horr v. Barkie, 298.
 Horton v. McCarty, 494, 517, 530,
 548, 581.
 Hosack v. Weaver, 563.
 Hotchkiss v. Ladd, 589, 590.
 Houghtaling v. Ball, 606.
 Houston v. Laffee, 209.
 Howard v. Borden, 256, 326*a*, 344.
 Howard v. Castle, 557.
 Howard v. Daly, 457.
 Howe v. Chesley, 590.
 Howe v. Dewing, 581.
 Howe v. Hayward, 363, 381.
 Howe v. Palmer, 21, 72, 257.
 Howe v. Smith, 361.
 Howell v. Maas, 508.
 Hubbert v. Borden, 405.
 Hubert v. Moreau, 480.
 Hubert v. Treherne, 472.
 Hudnut v. Weir, 593.
 Hudson v. Weir, 147.
 Hulse v. Young, 539.
 Humble v. Mitchell, 14, 139.
 Hunn v. Bowne, 306.
 Hunt v. Gregg, 581.
 Hunt v. Hecht, 258, 317, 332, 344.
 Hunter v. Giddings, 404, 425.
 Hunter v. Randall, 583.
 Hunter v. Wetsell, 363, 366, 370, 371.
 Hunter v. Wight, 353.
 Huntley v. Huntley, 113.
 Huntington v. Knox, 405.
 Hurff v. Hires, 298.
 Hurlburt v. Bogardus, 288.
 Hutchins v. Gilchrist, 336.
 Hutton v. Moore, 232.

I.

Ide v. Stanton, 404, 405, 423*a*.
 Innes v. Purcell, 27.
 Ireland v. Johnson, 391.
 Irvine v. Stone, 107.
 Isaacs v. Hardy, 88.
 Isherwood v. Whitmore, 299.
 Ivins v. Ackerson, 111.
 Ivory v. Murphey, 422, 423*a*.

J.

Jackson v. Covert, 15, 83.
 Jackson v. Hubbard, 261, 363.
 Jackson v. Lowe, 425, 426.
 Jackson v. Morter, 556.
 Jackson v. Tupper, 363, 366, 370.
 Jacob v. Kirke, 418, 477.
 James v. Catherwood, 609.
 James v. Muir, 222, 226, 405.
 James v. Patten, 429, 468, 475.
 James v. Williams, 439.
 Jamison v. Simon, 275.
 Janney v. Sleeper, 302.
 Janvrin v. Maxwell, 263, 264.
 Jeffcott v. North Br. Oil Co., 446.
 Jellison v. Jordan, 4, 419.
 Jenkins v. Hogg, 554.
 Jenkins v. Frink, 554.
 Jennings v. Flanagan, 362.
 Jenness v. Mt. Hope Iron Co., 405,
 434, 572.
 Jennings v. Webster, 253.
 Jenness v. Wendell, 235, 236, 541.
 Jewett v. Warren, 254, 327, 332.
 Johnson v. Campbell, 312.
 Johnson v. Cuttle, 268, 340, 353.
 Johnson v. Dodson, 253, 353, 424,
 447, 473.
 Johnson v. Latimer, 596.
 Johnson & Miller v. Buck, 429,
 485, 536.
 Johnson v. Roberts, 574.
 Johnson v. Wilkinson, 200, 211.
 Jones v. Flint, 160, 192.
 Jones v. Isaacs, 430.
 Jones v. Nanney, 549, 550, 570.
 Jones v. Nellis, 563.
 Joy v. Sears, 164.
 Joy v. Schoss, 108.
 Joyce v. Adams, 362.
 Justice v. Lang, 410, 440, 442, 507.

K.

Kealy v. Tenant, 256, 326*a*.
 Kearney v. Taylor, 554.
 Keatts v. Rector, 308.

- Kibble v. Gough, 292, 319, 320, 321, 324.
 Keeler v. Vandevere, 237.
 Kein v. Tupper, 268, 270.
 Keiwert v. Meyer, 245, 248, 344, 349.
 Kellogg v. Wetherhead, 60, 64, 258.
 Kelly v. Kelly, 405.
 Kemberly v. Patchin, 298.
 Kennedy v. Panama Mail Co., 566.
 Kent v. Huskinson, 323, 342.
 Kenworthy v. Scofield, 18, 569.
 Kelsey v. Henry, 114.
 Kerhof v. Atlas Paper Company, 290, 366.
 Kertz v. Fleisher, 133.
 Killmore v. Howlett, 182.
 Kimberly v. Patchen, 268.
 King v. Brower, 4.
 King v. Brown, 121.
 King & Clopton v. Jarman, 331.
 King v. Enterprise Ins. Co. 594.
 King v. Upton, 403.
 King v. Wood, 458.
 Kinghorne v. Montreal Tel. Co., 454, 457.
 Kingsley v. Holbrook, 170, 180, 210.
 Kinney v. Showdy, 562, 564.
 Kirby v. Johnson, 248, 262, 305.
 Kling v. Fries, 351.
 Klinitz v. Surry, 311.
 Knight v. Barber, 139, 150, 500.
 Knight v. Crockford, 469, 472.
 Knight v. Mann, 248, 268, 312, 341.
 Knox v. King, 518.
 Kountz v. Kirkpatrick, 233.
 Kraft v. Greathouse, 587.
 Kramer v. McCaughey, 129.
 Kriete v. Myer, 413.
 Krohn v. Bantz, 390, 592, 593.
 Krom v. Levy, 297.
 Krulder v. Ellison, 278, 349.
 Kuhns v. Gates, 247.

 L.
 Labor v. Koflin, 513.
 Laing v. Fidgeon, 223.
 Lake Shore & Mich. S. R'y Co. v. Roach, 27.
 Lamb v. Crafts, 32, 168, 189.
 Lamborn v. Watson, 10.
 Lamprey v. Sargent, 328.
 Lance v. Cowan, 563.
 Landis v. Morrissey, 597.
 Lane v. Melville, 125.
 Lansing v. Turner, 264, 306.
 Lash v. Parlin, 414, 487, 509.
 Latham v. Atwood, 158.
 Latham v. Morrow, 557.
 Lauz v. McLaughlin, 437.
 Lawrence v. Allen, 215.
 Lawrence v. Burnham, 288.
 Lawrence v. Chase, 286, 403.
 Lawrence v. Smith, 192, 197.
 Lawrenson v. Butler, 422, 450, 502.
 Leavitt v. Watson, 518.
 Lee v. Griffin, 32, 49, 73, 78, 88, 90.
 Lee v. Hillis, 425, 448.
 Lee v. Lee, 557.
 Lee v. McLeod, 205.
 Lee v. Mahoney, 412, 426.
 Lees v. Whitcomb, 439.
 Leisherness v. Berry, 327.
 Lemonier v. Charlebois, 251.
 Lemaire v. Stanley, 479.
 Leonard v. Davis, 326.
 Leonard v. New York, etc., Tel. Company, 454.
 Lerner v. Johns, 405.
 Lerner v. Waunemaker, 425.
 Lessee of Wright v. Deklyne, 551.
 Levins v. Rovegus, 256.
 Levy v. Merrill, 403.
 Lillywhite v. Devereaux, 285, 341.
 Lincoln v. The Erie Preserving Co., 456.
 Lingham v. Eggleston, 279, 334, 417.
 Linn Boyd Tobacco Warehouse Co. v. Terrill, 548.
 Linsley v. Tibbals, 431.
 Little Rock & Fort Smith Railway Co. v. Page, 331.
 Lloyd v. Wright, 258, 286, 345.
 Locke v. Williamson, 246.

Lockwood v. Barnes, 293.
 Loomis v. Newall, 129.
 Lorman v. Benson, 214.
 Louisville Prize Mining Co. v.
 Scudder, 591.
 Low v. Andrews, 32.
 Low v. Hall, 513.
 Lowery v. Mehaffy, 423a.
 Lownsedale v. Hunsaker, 289.
 Ludwig v. Fuller, 330.
 Ludewig v. Pariser, 27.
 Lunn v. Hoag, 329.
 Lyle v. Shinnebarger, 265, 408.

M.

Maberly v. Sheppard, 332.
 Macdonald v. Henderson, 552.
 Maclean v. Dunn, 504.
 Macomber v. Parker, 17, 417.
 Mactier v. Frith, 52, 461.
 McBlain v. Cross, 463.
 McBride v. Silverthorne, 412.
 McCarthy v. Nash, 261, 287.
 McCaul v. Straus, 425, 428, 434.
 McComb v. Wright, 467, 524, 581.
 McCombs v. McKennan, 126.
 McConnell v. Hughes, 232, 239.
 McCormick v. Drummatt, 583.
 McCraw v. Welch, 286.
 McCrea v. Marsh, 211.
 McCulloch v. Ins. Co. 457.
 McDonald v. Berwick, 439.
 McDougald v. Banks, 596.
 McDowell v. Chambers, 480.
 McElroy v. Buck, 405, 411.
 McElroy v. Seery, 406, 491.
 McGiven v. Fleming, 476.
 McGregor v. Brown, 194, 210.
 McIlvane v. Harris, 164.
 McKnight v. Dunlap, 261, 276, 293,
 374.
 McLaughlin v. Peatti, 262.
 McLea v. Robinson, 232.
 McLeod v. Jones, 199, 211.
 McMartin v. Moore, 332.
 McMillen v. Terrill, 410.
 McMullen v. Helberg, 504, 529.
 McWhorter v. McMahon, 494.
 Maddison v. Alderson, 399.
 Maddock v. Stock, 218.
 Magruder v. Gage, 346.
 Malone v. Plato, 252.
 Manser v. Buck, 549.
 Mann v. Whitbeck, 314.
 Marble v. Moore, 418.
 Marie v. Garrison, 400, 604, 606.
 Markham v. Jandon, 248.
 Marshall v. Ferguson, 164, 180, 183,
 252.
 Marshall v. Green, 95, 191, 203, 317.
 Marshall v. Peters, 214.
 Marsh v. Hyde, 281, 404.
 Marsh v. Rouse, 248, 253, 263, 368.
 Marston v. Baldwin, 337.
 Marston v. Sweet, 588.
 Martin v. Blanchett, 591.
 Martin v. Dana, 578.
 Martineau v. Kitching, 239.
 Marvin v. Wallis, 246, 267, 332.
 Mason v. Brunskill, 443.
 Mason v. Decker, 147, 423a.
 Mason v. Phelps, 232.
 Mason v. H. Whitbeck Company,
 259, 285, 303.
 Massell v. Cooke, 141.
 Mattice v. Allen, 362, 386.
 Matthiessen & Weichers R. Co. v.
 McMahon, Adm'r, 248, 286, 368,
 384.
 Matthison v. Wescott, 122.
 Mattison v. Schofield, 52.
 Matlock v. Fry, 166.
 Maxwell v. Brown, 271, 345.
 Maxwell v. Day, 390.
 May v. Ward, 443.
 Mayer v. Child, 146, 150.
 Mayfield v. Wadsley, 129.
 Maynard v. Anderson, 337.
 Mead v. Case, 11, 37, 54, 56, 57, 60,
 102.
 Mead v. DeGolyer, 297.
 Means v. Williams, 248, 263.
 Mechanics', etc., Bank v. Farmers',
 etc., Bank, 326.

- Meincke v. Falk, 37, 39, 48, 64, 96,
 108, 291.
 Megaw v. Molloy, 504.
 Menzies v. Dodd, 253, 329.
 Merchant v. Chapman, 339, 353.
 Meredith v. Meigh, 344, 353.
 Merrill v. Western Union Tel. Co.,
 457.
 Merrill v. Wilson, 503.
 Merritt v. Clason, 15, 470, 483.
 Mesnard v. Aldridge, 549, 566.
 Messer v. Woodman, 235, 236.
 Mews v. Carr, 522, 528, 530, 570.
 Middlesex Co. v. Osgood, 302, 403.
 Millar v. Fitzgibbons, 445.
 Miller v. Baker, 202.
 Miller v. Bascom, 337.
 Miller v. State, 166, 170.
 Miller v. Upton, 599.
 Mills v. Hunt, 235, 542.
 Mills v. Kuykendall, 599.
 Mill River Mfg. Co. v. Smith, 214,
 216.
 Minturn v. Allen, 516.
 Minturn v. Main, 516.
 Metts v. Bright, 531.
 Mixer v. Howarth, 31, 32, 39, 77,
 105, 106, 189.
 Mollett v. Wackerbarth, 513.
 Moncrieff v. Goldsborough, 557.
 Montgomery v. Edwards, 402, 590.
 Montgomery v. Hunt, 327.
 Moore v. Campbell, 505.
 Moore v. Mountcastle, 414, 509.
 Morehead v. Hunt, 557.
 Moreland v. Myall, 166.
 Morgan v. Kidder, 299.
 Morin v. Martz, 410, 437.
 Morrill v. Cooper, 368.
 Morse v. Sherman, 26, 286.
 Morton v. Dean, 531, 536, 548, 576.
 Morton v. Tibbett, 258, 317, 318,
 319, 321, 332.
 Morris v. Blair, 411.
 Morrison v. Tonner, 465.
 Morrow v. Reed, 120, 291.
 Mortimer v. Bell, 556, 559.
 Moss v. Cohen, 537.
 Moss v. Green, 414.
 Muchlow v. Mangles, 80.
 Muckey v. Howenstine, 106.
 Mueller v. Guye, 254, 327.
 Mullaly v. Holden, 582, 584.
 Mumford v. Whiting, 200.
 Munn v. Berger, 251.
 Murfree v. Carmack, 531.
 Murphy v. Helmrich, 492.
 Myer v. Whitaker, 214.

 N.
 Nassau G. L. Co. v. Brooklyn, 215.
 National Bank of Metropolis v.
 Sprague, 555, 560.
 National Fire Ins. Co. v. Loomis,
 556.
 Neelson v. Sanborne, 404.
 Newby v. Rogers, 410, 423a.
 Newberry v. Wall, 225, 429, 498,
 499.
 Newcomb v. Clark, 405, 436.
 Newhall v. Langdon, 298.
 Newell v. Rudford, 420.
 Newman v. Morris, 74, 81.
 Newton v. Bronson, 485, 494.
 Nichols v. Allen, 63, 440.
 Nichols v. Johnson, 405.
 Nichols v. Mitchell, 62.
 Nicholls v. Plume, 282a.
 Nicholson v. Bower, 340.
 Noakes v. Morey, 436, 492.
 Noble v. Ward, 10.
 Noye v. Gregory, 488.
 Nomington v. Cook, 297.
 Norman v. Phillips, 258, 259, 292,
 332, 340.
 Norris v. Blair, 448, 518, 536, 539.
 North v. Forrest, 145, 151.
 Noyes v. Humphreys, 107.
 North v. Mendel, 404, 462.
 Northern v. The State, 165.
 Nutting v. Dickenson, 4, 232.
 Nuttleton v. Sikes, 201.

O.

- Oakman v. Rodgers, 425, 444.
 O'Brien v. Barker, 282a.
 O'Donnell v. Brehen, 180, 194, 248.
 O'Donnell v. Leeman, 530.
 Ogden v. Stewart, 451.
 Old Colony R. R. Co. v. Evans, 423a.
 Oliphant v. Baker, 267.
 Olmstead v. Niles, 192.
 Olson v. Mayer, 164, 246.
 O'Neil v. Crain, 411, 414, 509.
 O'Neill v. James, 52.
 O'Neil v. N. Y. & Silver Peak Mining Co., 36, 60.
 O'Neill v. N. Y. Cent. & H. R. R. Co., 356.
 Orcutt v. Nelson, 339, 353.
 Organ v. Stewart, 370.
 Orman v. Hagar, 127.
 Ormond v. Anderson, 422, 450.
 Ormsby v. Lewis, 402.
 Osborne v. Endicott, 597.
 Osborn v. Marquand, 314.
 Outwater v. Dodge, 15, 314, 330.
 Owens v. Field, 208.
 Owens v. Lewis, 181, 207.

P.

- Packard v. Dunsmore, 330.
 Packard v. Richardson, 242, 403.
 Page v. Carpenter, 328.
 Page v. Monks, 107.
 Page v. Morgan, 292, 319, 320.
 Paige v. Clough, 338.
 Paige v. O'Neil, 96.
 Paige v. Ott, 296.
 Paine v. Fulton, 379, 384.
 Paine v. Woods, 214.
 Palmer v. Marquette & P. R. Mill Co., 442.
 Parkhurst v. Van Cortlandt, 457.
 Parker v. Jervis, 326, 330.
 Parker v. Staniland, 154, 156, 170, 171, 191.

- Parker v. Schenck, 43, 96, 106, 187.
 Parker v. Steward, 393.
 Parker v. Wallis, 332, 413.
 Parker v. Way, 168.
 Parker v. Wilson, 470, 474.
 Parsons v. Loucks, 28, 43, 49, 51, 101, 103, 109.
 Parsons v. Phelan, 555.
 Parsons v. Smith, 181, 212.
 Parsons v. Woodward, 37, 191.
 Partridge v. Wilsey, 41, 397, 601.
 Passaic Manuf. Co. v. Hoffman, 22, 52, 398, 445.
 Pattison v. Mills, 609.
 Payne v. Cave, 524, 549, 570.
 Pawelski v. Hargreaves, 70.
 Pawle v. Gunn, 148.
 Peabody v. Speyers, 150, 152.
 Peacock v. Purvis, 156.
 Pecker v. Kennison, 107, 476.
 Peich v. Dickson, 459.
 Peirce v. Cort, 428.
 Peirce v. Corf, 553.
 Peirce v. Lyman, 331.
 Penniman v. Hartshorn, 327, 409, 472.
 People v. Knickerbocker Ice Company, 214, 215.
 People v. Lord, 556.
 People v. New York Floating Dry Dock Co., 215.
 People v. N. Y. & Manhattan Beach R'y Co., 27.
 People v. White, 573.
 Peters v. Ballastier, 344.
 Petrie v. Dorwin, 276.
 Pettitt v. Mitchell, 529.
 Petty v. Evans, 199.
 Phelps v. Hunnewell, 267.
 Pheps v. Cutler, 344.
 Philbrook v. Belknap, 403.
 Phillips v. Adams, 583.
 Phillimore v. Berry, 546.
 Phillips v. Bistolli, 231, 579.
 Phillips v. Moore, 52.
 Phillips v. Ocmulgee Mills, 256, 425, 499.

- Phippen v. Stickney, 557.
 Phipps v. McFarlane, 29, 60, 72, 96,
 103, 121.
 Picket v. Swift, 38, 40.
 Pickering v. Appleby, 140.
 Pierce v. Bouton, 96, 110.
 Pierce v. Gibson, 360.
 Pierson v. Crooks, 258.
 Pierrepont v. Barnard, 192, 206.
 Pike v. Balch, 548, 578.
 Pike v. Fay, 415.
 Pike v. Vaughn, 120, 291, 379.
 Pike v. Wieting, 307.
 Pitcher v. Hennessy, 419, 443.
 Pillans v. Van Mierop, 12.
 Pinckney v. Hagadon, 547, 570.
 Pindall v. Trevor, 308.
 Pinkham v. Mattox, 247, 256, 263,
 309, 327, 499.
 Pitkin v. Noyes, 38, 40, 48, 96,
 115, 168, 192.
 . . . Poor v. Oakman, 212.
 Porter v. Rose, 602.
 Porter v. Wormer, 147, 586.
 Portman v. Willis, 137.
 Potter v. Duffield, 543.
 Powell v. Jessop, 139.
 Potts v. Whitehead, 573.
 Powers v. Barber, 304.
 Pratt v. Ogden, 209.
 Pratt v. Pick, 290.
 Pratt v. Turner, 494.
 Pray v. Mitchell, 146, 149.
 Prescott v. Locke, 29, 38, 96, 247,
 271, 285.
 Price v. Dunn, 538, 573.
 Price v. Weaver, 582.
 Printing and Numerical Register-
 ing Co. v. Sampson, 19.
 Printup v. Barrett, 596.
 Proctor v. Jones, 11, 257, 307.
 Propert v. Parker, 470.
 Prosser v. Henderson, 457.
 Puckett v. Read, 331.
 Pullian v. Wright, 286.
 Purner v. Piercy, 170, 176.
 Putnam v. Tillotson, 339.
- Putney v. Day, 183, 194, 402.
 Pym v. Campbell, 437.
- Q.
- Quick v. Wheeler, 439.
 Quinlan v. Raymond, 588.
 Quintard v. Bacon, 284.
- R.
- Rafferty v. Lougee, 523.
 Rand v. Mather, 107, 477.
 Rann v. Hughes, 8, 12.
 Rapelye v. Mackie, 330.
 Rapelye v. Smith, 230.
 Rappleye v. Adie, 262, 307.
 Rasch v. Bissell, 125.
 Raynes v. Crowder, 556.
 Raynor v. Linthorne, 494.
 Re Carew's Estate, 554.
 Reed v. Latham, 431, 572.
 Remick v. Sandford, 247, 281, 310.
 Rennys v. Proctor, 531.
 Rentch v. Long, 60, 87, 116.
 Reshton v. Whatmore, 552.
 Reuss v. Picksley, 423.
 Rex v. The Inhabitants of Hern-
 don, etc., 208.
 Rex v. Marsh, 557.
 Rhea v. Puyear, 308.
 Rhodes v. Castner, 412.
 Rhodes v. Ibberton, 549.
 Rice v. Manley, 134.
 Rice v. Peet, 129.
 Richards v. Cunningham, 583.
 Richards v. Porter, 429.
 Richardson v. Richardson, 199.
 Richardson v. Squires, 383.
 Rickard v. Moore, 282a, 320, 321,
 324.
 Ricker v. Cross, 327.
 Rickey v. Tenbroeck, 368.
 Riddle v. Varnum, 230.
 Ridgway v. Bowman, 443.
 Ridgway v. Ingram, 414, 425, 448,
 466.

- Ridgway v. Wharton, 412.
 Riggs v. Magruder, 137, 147.
 Right v. Price, 10.
 Riley v. Farnsworth, 411.
 Rindskopf v. De Ruyter, 214, 351.
 Rinquist v. Ditchell, 488.
 Robbins v. Deverill, 595.
 Robinson v. Rutter, 539.
 Robinson v. Uhl, 583.
 Roberts v. Mazeppa Mill Co., 302.
 Robertson v. Vaughn, 25.
 Rodgers v. Phillips, 248, 271, 278,
 284, 340, 343, 344, 345, 355.
 Rodwell v. Phillips, 172.
 Roethke v. Brewing Co., 351.
 Rogers v. Huie, 563.
 Rogers v. Jones, 247.
 Rogers v. Stevenson, 29, 399.
 Rogers v. Wheeler, 356.
 Rohde v. Thwaites, 270, 279.
 Roland v. Gundy, 563.
 Rommel v. Wingate, 454.
 Rondeau v. Wyatt, 15, 23, 74, 76,
 77, 80, 82, 83, 84, 586.
 Roots v. Lord Dormer, 235, 541.
 Ropes v. Lune, 418.
 Rosepaugh v. Vredenburgh, 4, 419.
 Ross v. Welch, 166, 170, 344.
 Rossiter v. Miller, 543.
 Rourke v. Ballens, 337.
 Routledge v. Grant, 574.
 Rowe v. Osborne, 503.
 Rucks v. Barbour, 573.
 Rucker v. Cammeyer, 495.
 Rugg v. Minett, 235, 335, 541.
 Russell v. Myers, 193, 403.
 Russell v. O'Brien, 332.
 Russel v. Carswell, 498.
 Ryan v. Dorr, 133, 303.
- S.
- Sadler v. Whitmore, 247.
 Safford v. Annis, 164.
 Safford v. McDonough, 248, 263,
 341.
 Sainsbury v. Matthews, 170.
- Saint Vincent Orphan Asylum v.
 Troy, 208.
 Sale v. Darragh, 510.
 Sale v. Lambert, 543.
 Salkirk v. Cobb, 494.
 Salmon Falls Manufacturing Co. v.
 Goddard, 413, 415, 459, 465, 477,
 506, 523.
 Saltus v. Everett, 563.
 Samuels v. Gorham, 284.
 Sanborn v. Flagler, 477, 480, 523.
 Sari v. Boudellon, 472.
 Saul v. His Creditors, 608.
 Saunderson v. Jackson, 373, 425,
 450, 465, 477, 479.
 Sawyer v. Nichols, 256.
 Schneider v. Norris, 465, 473, 478,
 479.
 Schriefer v. Wood, 214, 215.
 Schultz v. Bradley, 248, 416, 451.
 Scofield v. Hernandez, 513.
 Scott v. Bush, 590.
 Scott v. Eastern Counties Railway
 Company, 14, 219, 252, 287.
 Scotten v. Sutter, 279.
 Scovill v. Boxall, 194, 210.
 Scovell v. Griffiths, 459.
 Sears v. Brink, 12.
 Secret v. Twilty, 573.
 Selby v. Selby, 471.
 Servier v. Walker, 537.
 Sewall v. Fitch, 15, 25, 28, 43, 56,
 83, 97, 102, 487.
 Sewell v. Eaton, 150.
 Seymour v. Davis, 60, 109, 261, 511.
 Shadlow v. Cotterell, 553.
 Sharp v. Carroll, 392.
 Shaw v. Finney, 494.
 Shellits v. Reineking, 608.
 Shepherd v. Pressey, 51, 253, 263,
 271, 272, 285.
 Sherman v. Scott, 133.
 Sherry v. Picken, 165.
 Sherwood v. Saxon, 584.
 Shiel v. Colonial Bank, 544.
 Shindler v. Houston, 22, 254, 270,
 283, 285, 330, 378.

- Shurtliff v. Willard, 332.
 Shute v. Door, 129.
 Sievwright v. Archibald, 446, 504, 507, 508.
 Silver v. Bowne, 280, 352.
 Simmons v. Swift, 17, 336.
 Simmons Hardware Company v. Mullen, 350.
 Simmons v. More, 488.
 Simon v. Metevier, 18, 497, 518, 540.
 Simonton v. Minneapolis Bank, 572.
 Simons v. Steele, 433.
 Simpson v. Krumdick, 248, 318.
 Simpson v. Pettus, 583.
 Singstack v. Harding, 524.
 Slater v. Maxwell, 554.
 Sloan Sawmill and Lumber Co. v. Guttshall, 34, 295, 600.
 Slocum v. Seymour, 181, 194.
 Small v. Quincy, 419, 425.
 Smith v. Arnold, 425, 485, 494, 530, 532, 534, 548, 570.
 Smith v. Auerbach, 599.
 Smith v. Benson, 181.
 Smith v. Bouck, 285.
 Smith v. Brady, 297.
 Smith v. Bryan, 164, 188, 203.
 Smith v. Clarke, 561.
 Smith v. Colby, 430.
 Smith v. Easton, 455, 456.
 Smith v. Ellis, 549.
 Smith v. Fisher, 29, 185.
 Smith v. Gouly, 572.
 Smith v. Gowdy, 456.
 Smith v. Hudson, 246, 282a, 325.
 Smith v. Ide, 440.
 Smith v. Jones, 410, 430, 462.
 Smith v. McVeigh, 133a.
 Smith v. Milliken, 285.
 Smith v. New York Cent. Railroad Co., 28, 49, 60.
 Smith v. Richards, 566.
 Smith v. Shell, 408, 423.
 Smith v. Smith, 129.
 Smith v. Stroller, 259, 313.
 Smith v. Surman, 46, 74, 78, 84, 94, 184, 332.
 Snider v. Thrall, 300.
 Snow v. Warner, 341.
 Solomon v. Webster, 572.
 Solomons v. Chesley, 327.
 Somerby v. Buntin, 141, 143, 150.
 Southern Life Insurance & Trust Co. v. Cole, 146.
 Sourwine v. Truscott, 572.
 Sousely v. Burns, 302.
 Sovereign v. Ortman, 405.
 Spalding v. Archibald, 206.
 Spencer v. Babcock, 459.
 Spencer v. Cone, 106, 189.
 Spencer v. Hale, 282a, 314, 340, 341, 344.
 Spooner v. Holmes, 563.
 Sprague v. Blake, 261.
 Springer v. Kleinsorge, 458, 584.
 Spurrier v. Fitzgerald, 586.
 Spyer v. Fisher, 495.
 Stagg v. Compton, 429.
 Stammers v. O'Donohue, 545.
 Stansell v. Leavitt, 129, 189.
 Starman v. Brandt, 535.
 State v. Keeler, 549.
 State v. Litchfield, 456.
 State v. Potlmeyer, 214, 216.
 Slater v. Smith, 410.
 Stead v. Danber, 393.
 Steele v. Ellmaker, 557, 558.
 Steel v. Fife, 404.
 Steel Works v. Dewey, 298.
 Stephens v. Santer, 47, 187.
 Stephenson v. Arnold, 133a.
 Stevens v. Hall, 451.
 Stevens v. Stewart, 162, 256.
 Stevenson v. Irwin, 96.
 Stewart v. Doughty, 156.
 Steward v. Scudder, 415.
 Stinson v. Clark, 330.
 Stoddard v. Vestry, 540.
 Stokes v. Moore, 470.
 Stone v. Browning, 225, 247, 256, 258, 283, 309.
 Stone v. Dennison, 4.

Stone v. Marsh, 563.
 Stone v. Peacock, 413.
 Stone v. Perry, 336.
 Stone v. Sanborn, 456.
 Stoops v. Smith, 419, 422, 443.
 Stotsbury v. Vail, 133*a*.
 Storm v. Manchaug, 214.
 Strong v. Dodds, 309, 317, 330,
 344, 353, 590.
 Stubbs v. Lund, 341.
 Suman v. Springgate, 594.
 Sutherland v. Carter, 118.
 Sweet v. Lee, 420, 477.
 Sweet v. Shumway, 415.
 Sweetland v. Barrett, 582, 599.
 Swegart v. McGee, 294.
 Switzer v. Skiles, 554.
 Symons v. James, 549.

T.

Taintor v. Prendergast, 494.
 Tallman v. Franklin, 425, 446, 570.
 Tanner v. Scovill, 312.
 Tarleton v. Vietes, 598.
 Tayloe v. Riggs, 419, 443.
 Taylor v. Merchants' Ins. Co., 457.
 Taylor v. Mueller, 312, 340, 350.
 Taylor v. Patterson, 243.
 Taylor v. Steamboat Robert Campbell, 454.
 Taylor v. Waters, 200, 210.
 Tague v. Fowler, 308.
 Teal v. Auty, 161, 194, 210.
 Teed v. Teed, 384.
 Tempest v. Fitzgerald, 21, 254, 266,
 285, 332.
 Tempest v. Kilner, 14.
 Terrell v. Frazier, 205.
 Thayer v. Rock, 129.
 Thompson v. Alger, 373, 374, 378.
 Thompson v. Davenport, 436.
 Thompson v. Davies, 554.
 Thompson v. Ketchum, 608.
 Thompson v. Meinck, 293, 409, 425.
 Thompson v. Fargo, 278.
 Thomas v. Lumley, 513.

Thomas v. Williams, 129.
 Thornborow v. Whitacre, 394.
 Thorndike v. Locke, 147.
 Thornett v. Haines, 562.
 Thornton v. Kempster, 423, 505.
 Thornton v. Meux, 504.
 Thrall v. Lathrop, 299.
 Thurston v. Thornton, 572.
 Tinkler v. Swaynie, 594.
 Tipton v. Feitner, 238.
 Tisdale v. Harris, 144, 149, 150, 399.
 Tompkins v. Haas, 235.
 Topping v. Root, 602.
 Torrence v. Bolton, 566.
 Torret v. Crupps, 478.
 Torry v. Holmes, 503.
 Tower v. Tudhope, 256, 499.
 Towne v. Collins, 563.
 Towers v. Osborne, 15, 66, 69, 74,
 80.
 Towle v. Leavitt, 562, 570.
 Townsend v. Corning, 547.
 Townsend v. Hargraves, 10, 248,
 268, 293, 368, 419.
 Townsend v. Hubbard, 547.
 Townsend v. Van Tassel, 548.
 Towsley v. Moore, 4.
 Treadwell v. Reynolds, 282*a*.
 Trevor v. Wood, 457, 460.
 Troup v. Wood, 557.
 Trueman v. Loder, 435, 496, 513.
 Trust v. Delaplaine, 559.
 Tucker v. Ross, 332.
 Tull v. David, 535.
 Turley v. Bates, 239, 279.
 Turner v. Mason, 122, 124.
 Tuttle v. Tuttle, 168.
 Tuxworth v. Moore, 267.
 Twist v. Kelly, 288.
 Tyers v. Rosedale & Ferryhill Iron
 Co., 451.
 Tyler v. Bennett, 194.

U.

Uhl v. Robinson, 583.
 United States v. Hathaway, 214.

United States v. Parmlee, 436.
 United States Reflector Co. v.
 Rushton, 276.
 Upton v. Strubridge Cotton Mills,
 286.
 Upton v. Winchester, 222.
 Utley v. Donaldson, 572.

V.

Valpy v. Gibson, 222.
 Vance v. Boynton, 262, 265.
 Vanderbilt v. Eagle Iron Works,
 297.
 Vaustenbergh v. Hoffman, 391.
 Van Sickle v. Nester, 167.
 Van Woert v. Albany & Susque-
 hanna R. R. Co., 248, 293.
 Vassar v. Camp, 52, 461.
 Vaupel v. Woodward, 228, 474,
 583.
 Vawter v. Griffin, 147, 148.
 Veazie v. Williams, 556, 561.
 Veazy v. Harmony, 299.
 Ventress v. Smith, 563.
 Vincent v. Germand, 15, 308.
 Vidal v. Thompson, 609.
 Vielie v. Osgood, 465, 475.
 Vining v. Gilbreth, 330.
 Violet v. Powell, 405.
 Vischer v. Webster, 156.

W.

Waddington v. Bristow, 160, 161.
 Wade v. New York & Oswego
 Midland Railroad Co., 280, 291.
 Wain v. Warlters, 5, 242.
 Walden v. Murdock, 262, 326, 332.
 Waldron v. Chase, 298.
 Waldron v. Romaine, 339, 344.
 Walker v. Constable, 518.
 Walker v. Hening, 531, 581.
 Walker v. Lovell, 107.
 Walker v. Nussey, 362, 384.
 Walker v. Sherman, 156.
 Walker v. Supple, 137.

Wallis v. Littell, 437.
 Wallis v. Smith, 19.
 Wallis v. Wallis, 130.
 Walrath v. Ingles, 372, 387.
 Walrath v. Richie, 274, 384.
 Walsh v. Barton, 557, 562.
 Ward v. Shaw, 330.
 Ward v. The People, 214.
 Warfield v. Wisconsin Cranberry
 Co., 275.
 Warlow v. Harrison, 562, 570.
 Warner v. Feige, 417.
 Warner v. Trow, 195.
 Warren v. Leland, 179, 196.
 Wartman v. Breed, 256.
 Warwick v. Bruce, 161, 170.
 Warwick v. Slade, 513, 573.
 Waterman v. Meigs, 189.
 Watson v. Spratley, 139.
 Watt v. Wisconsin Cranberry Co.,
 457.
 Watts v. Friend, 15, 46, 77, 95, 115,
 154, 240, 338.
 Waydell v. Luer, 391.
 Weatherby v. Higgins, 166.
 Webster v. Howe, 351.
 Webster v. Hoban, 551.
 Webster v. Zeilly, 47, 404, 409, 438.
 Weiand v. Crichfield, 118.
 Weightman v. Caldwell, 71, 113,
 404.
 Welch v. Moffat, 297.
 Weld v. Carne, 264.
 Weld v. Cutler, 328.
 Welford v. Beazley, 450.
 Wells v. Day, 235, 541.
 Wells v. Railway Company, 458.
 Welz v. Rodeus, 133a.
 Wemple v. Knoff, 410, 437.
 West v. Newton, 440.
 Wentworth v. Wentworth, 598.
 Wescott v. Delano, 172.
 Westbrook v. Eager, 156.
 Western v. Russell, 422.
 Westheimer v. Peacock, 606, n. 2.
 Weston v. McDowell, 137.
 Wetmore v. Neuberger, 193.

- Whaley v. Hinchman, 409, 458.
 Wheat v. Cross, 456.
 Wheelwright v. Depeyster, 563.
 Whelan v. Sullivan, 444.
 Whipple v. Foot, 156.
 Whipple v. Thayer, 267.
 Whitchurch v. Whitchurch, 6.
 White v. Coen, 494, 518, 548.
 White v. Foster, 95, 181, 212.
 White v. Madison, 488.
 White v. Maynard, 211.
 White v. Proctor, 546, 550, 569.
 Whitehead v. Anderson, 341.
 Whitehouse v. Frost, 230, 298.
 Whitmarsh v. Conway Ins. Co., 415.
 Whitmarsh v. Walker, 201.
 Whitridge v. Parkhurst, 435.
 Whittemore v. Gibbs, 147.
 Whitwell v. Vincent, 230.
 Whitwell v. Wyer, 367, 374.
 Wiener v. Whipple, 489.
 Wilbur v. How, 554.
 Wilcox v. Hunt, 608.
 Wilcox v. Jackson, 286.
 Wildbahn v. Robidoux, 584.
 Wilder v. Cowles, 503.
 Wilkes v. Ferris, 314, 326, 330.
 Wilkinson v. Evans, 428, 432.
 Wilkinson v. Holiday, 279, 334.
 Wilks v. Atkinson, 84.
 Wilmouth v. Patten, 302.
 Williams v. Bacon, 409, 438, 523.
 Williams v. Burgess, 338.
 Williams v. Millington, 540.
 Williamson v. Farrow, 531.
 Williams v. Morris, 403.
 Williams v. Poor, 567.
 Williams v. Robinson, 242, 403, 410, 423, 425.
 Williams v. Ross, 544.
 Williams v. Woods, 435.
 Wilson v. Hunter, 435.
 Wilson v. Watts, 10.
 Winn v. Albert, 532.
 Winship v. Buzzard, 69.
 Winslow v. Bradley, 595.
 Wisman v. Lucksinger, 208.
 Wisnell v. Tefft, 584.
 Withers v. Reynolds, 444.
 Wolfe v. Tuyster, 557.
 Wolfenden v. Wilson, 57, 122.
 Wood v. Baxter, 546.
 Wood v. Hall, 557.
 Wood v. Lake, 132.
 Wood v. Leadbitter, 132.
 Wood v. Manley, 199, 211.
 Wood v. McGee, 298.
 Wood v. Shultis, 4.
 Woodburn Wheel Co. v. Philbrook, 232.
 Woodford v. Patterson, 262.
 Woodward v. Harris, 440.
 Worrall v. Munn, 423*a*, 494.
 Wooster v. Sage, 338.
 Wright v. Dannot, 534, 546.
 Wright v. Jones, 583.
 Wright v. O'Brien, 88, 122.
 Wright v. Wakeford, 479.
 Wright v. Weeks, 225.
 Wylie v. Kelly, 262, 386.
 Wyndham v. Chetwynd, 6, 10.
 Wynne v. Jackson, 609.
 Wyoming National Bank v. Dayton, 326.

Y.

- Yale v. Seely, 207, 263.
 Yallop-De Groot Company v. Minneapolis & St. Louis R. R. Company, 312.
 Yeakle v. Jacob, 210.
 Young v. Blaisdell, 248, 263.
 Young v. Miles, 298.
 Young v. Mertens, 413.
 Younge v. Jervis, 194.

LAW OF SALES
OF
GOODS, WARES AND MERCHANDISE
UNDER
THE STATUTE OF FRAUDS.

CHAPTER I.

OF THE AUTHORSHIP AND HISTORY OF THE STATUTE OF
FRAUDS.

- § 1. General observations.
- 2. The statute of frauds; its preamble and meaning.
- 3. Objects and requirements of the statute.
- 4. The statute prescribes a rule of evidence.
- 5. Authorship of the statute; Sir Matthew Hale.
- 6. Different opinions as to its authorship.
- 7. Certain sections prepared by Sir Leoline Jenkins.
- 8. Preparation and passage of the statute; Lord Nottingham in connection with the same.
- 9. The statute passed upon by several committees.
- 10. Criticisms upon the statute of frauds.
- 11. Of the early objections to the statute.
- 12. Conflict of opinion as to its meaning.
- 13. The common law; reformations under section 17 of the statute.
- 14. Lord Tenterden's act; part of the statute.
- 15. Some early cases affecting executory contracts.
- 16. The common law doctrine.
- 17. Contract and communication; *Simmons v. Swift*.
- 18. Of auction sales; conflict of authority as to such sales being
 \ within the statute; the case of *Simon v. Metevier*.

19. Justice as dispensed by the chancellors; the modern tendencies.
20. Contracts construed according to the intention of the parties.
21. Interpretation of the statute; Lord Tenterden's views.
22. Nice distinctions discarded in construing the statute of frauds.
23. The common and statute law; the *lex scripta* and *lex non scripta*.

§ 1. A learned jurist has eloquently said that on the pages of the statute book are chiseled, as indelibly as on the pyramids of Cheops or on the frieze of the Parthenon, the episodes of a nation's history. They are foot-prints on the highway of legislation.

There, as in relief they stand, evidences of popular struggle; reminiscences of religious animosity; memorials of attempts to enlarge private rights or control public wrongs; or to influence the currents of commerce.

Each enactment in turn, from the renowned and far-reaching Magna Charta of King John, to the Statute of Frauds of King Charles, and from the Statute of Frauds to the present time, has required and received judicial construction.

The sages of the law, says Plowden, have been guided by the intention of the legislature, which they have always taken according to the necessity of the matter, and according to that which is consonant to reason and good discretion.

Judges have sometimes deemed themselves vested with authority to disregard the letter of a statute, in order to attain what they conceived to be the true ends of justice.

It is said that the law consists of two parts: body, and soul. The letter of the law is the body of the law, and the sense and reason of the law is the soul of the law. *Quia ratio legis est anima leges.*

§ 2. The act for the prevention of frauds and perjuries, or according to its more familiar appellation, the "Statute of Frauds," was passed in the twenty-ninth year of the reign of Charles the Second, and went into effect on the 24th day of June, 1677.¹ The intention of the act is fairly

¹ The reign of Charles II., properly the day on which his ill-fated father, Charles I., was beheaded, early dates from January 30, 1649,

expressed in the preamble: "For prevention of many fraudulent practices which are commonly endeavored to be upheld by perjury and subornation of perjury."¹

The high estimation in which the statute of frauds has been held, and the profound wisdom which inspired its policy, are evinced in the lofty encomiums which, from age to age, have been pronounced upon it.

For over two hundred years the statute of frauds has not only been the subject of much litigation, but has been largely instrumental in regulating the important matters of trade and commerce. A distinguished American jurist has said that it is the most comprehensive, salutary and important legislative regulation on record affecting the security of private rights.²

As the history of the statute of frauds, if not somewhat obscured in a labyrinth of uncertainty, is not as well understood as it should be, it is deemed of sufficient importance in this chapter to give a brief outline of its policy, its authorship and its innovations of the common law.

§ 3. In general, the object of the statute of frauds is to prevent dishonest practices in the ordinary transactions of business. It is intended to guard against the dishonesty of parties and the perjury of witnesses, as well as the misunderstanding and mistakes of honest men.

While it will be observed that the word *agreement* does not appear in section 17, it is required by that section that "some note or memorandum in writing of the said *bargain* be made and signed *by the parties to be charged* by such contracts, or their agents thereunto lawfully authorized."

Section 17 aims to draw the line of demarcation between

and not from the Restoration in 1660, as some writers have stated.

¹ The enacting words of an act of parliament are not always to be limited by the words of the preamble, but must in many instances go beyond it. Yet the words in the enacting part must be confined to

that which is the plain object and general intention of the legislature in passing the act, and the preamble affords a good clue to discover what that object was. Lord Tenterden, in *Hatton v. Cave*, 1 B. & A., 538.

² 2 Kent's Comm., 490.

the negotiation and the completion of the bargain in respect to the sale of goods, wares or merchandise. To accomplish this result it requires certain clear and unequivocal acts to be done in order to show that the thing has ceased to be *in fieri*. These acts are, either some note or memorandum in writing, or proof of some act confirmatory of the contract, as acceptance, earnest, or part payment, on the part of the buyer.

A memorandum of the contract being reduced to writing, and signed or subscribed by the party to be charged thereby, according to the statutory requirement, the object is effectually attained. The writing, in such case, becomes its own interpreter.

The act of part payment, or of delivery and acceptance, mentioned in the statute, is something over and beyond the contract, of which they are a part performance, and which they assume as already existing.

§ 4. As parol evidence has always been susceptible of fabrication, the purpose of the statute of frauds is to throw a safeguard around ordinary business, by requiring certain formal acts of the parties to the contract. While section 17 does not declare contracts void in default of such formalities being observed, nor in any way affect their substance or ingredients, it does prescribe, *as a rule of evidence*, in cases where they are sought to be enforced by an action at law, that oral proof thereof shall not be received.¹ If executed, the effect of its performance on the rights of the parties is unchanged and the consideration may be recovered.²

It is settled by abundant authority that in carrying out its purpose, the statute only affects *the modes of proof* as to

¹ Browne on Stat. of Frauds, § 115 and note; Roberts on Frauds, Pref., XXII. Rosepaugh v. Vredenburg, 16 id., 60; King v. Brower, 2 Hill, 485; Day v. N. Y. Cent. R. R. Co., 51 N.

² Stone v. Dennison, 13 Pick., 1; Y., 583; Boyden v. Crane, 7 Alb. Basford v. Pearson, 9 Allen, 387; Law Jour., 203; Towsley v. Moore, Nutting v. Dickenson, 8 id., 540; 30 Ohio St. R., 184; Jellison v. Wood v. Shultis, 4 Hun, 309; Jordan, 68 Maine, 373.

contracts falling within it. If a contract be completed according to the common law rules, then, as between the parties, at least, the property vests in the purchaser, and a right to the price in the seller. If a memorandum or proof of the alternative requirements, peculiar to the seventeenth section, be furnished, then the oral contract, as proved by the other evidence, is established.

§ 5. The glory of the authorship of the statute of frauds cannot justly be ascribed to any one man; for reason and tradition alike agree that this remarkable piece of legislation was the combined product of several judicial minds. Just as Homer had many birthplaces, so the statute of frauds has many progenitors. But, pre-eminent among the bright names to which contemporaneous history points as the principal author of the statute, is that of Sir Matthew Hale. This patient and profound jurist and great common law lawyer, together with the able civilian, Sir Leoline Jenkins, is said by Chief Baron Gilbert to have "prepared" the statute of frauds;¹ and Lord Ellenborough, in 1804, observed that the statute was "drawn" by Lord Hale.²

Sir Matthew Hale resigned his place as chief justice of the king's bench in February, 1676; he died on the following Christmas day. No name has been more venerated. His qualifications as a judge, says Lord Campbell, always shone with luster in proportion as the occasion called forth their display.

"Lord Hale," says Mr. Runnington, his biographer, "was actuated by the noble example of Pomponius Atticus; he walked through times of the most turbulent distraction, uncensured, unhurt."

On the bench

He reigned

In a superior sphere of cloudless day,
A pure intelligence.

¹ Chief Baron Gilbert's Rep. in the Chief Justices of England; Equity, 171, published in 1742. Bishop Burnet's Life of Hale, published in 1682; Runnington's Life

² Wain v. Warlters, 5 East, 10. See, also, 3 Campbell's Lives of the Chancellors, 418; 2 Camp. Lives of Dublin, 1792.

Although Hale's "Pleas of the Crown" and his "History of the Common Law" are enduring monuments to his name, it is as a *learned and upright judge* that his fame chiefly survives.

Cowper speaks of

"Immortal Hale, for deep discernment praised and sound integrity."

§ 6. In Roger North's life of his brother, the Lord Keeper Guilford, it is substantially stated that Lord Hale had the pre-eminence and was chief in the fixing of that law, and he had reason to think it had *its first spring from his Lordship's notice*.¹

On this question, however, Lord Mansfield has expressed some doubt. He bases his opinion upon the fact that the statute of frauds was not passed until after Lord Hale's death, and on the assumption that the act was introduced in parliament "in the common way, and not upon any reference to the judges."² But his reasons do not seem sufficient to countervail the contemporaneous evidences and the numerous opinions of the judges, that Lord Hale, in the main, drafted the statute.³ His long experience in the court of king's bench, his profound interest in everything relating to contracts of bargain and sale of personal property, and in administering the common law, lead to the conclusion that he was one of the principal authors of the statute of frauds. While no man may bear the palm alone, it is altogether improbable that a bill of such magnitude, making, as it did, so many innovations upon the delicate interests of private rights, should have received the concurrence of the parliament, and the approval of the king, without any reference to the judges, and a proper sanction from the bench.

¹ Roger North's Life of Lord Keeper Guilford, vol. 1, p. 108.

² Wyndham v. Chetwynd, 1 Burr., 418.

³ Whitchurch v. Whitchurch, 1 Strange, 621; Gilbert's Rep. in Eq., 171; Taylor on Ev., § 1000.

According to the Ninth Report of the Historical MSS. Commission, recently published in England, the bill was first introduced in parliament in the session of 1673-4, at least three years before its final passage.

An accurate writer has said that this enactment not only received the best inspiration of the courts, but was the actual product of different judicial minds.¹

§ 7. Reliable authorities agree that the distinguished Sir Leoline Jenkins took some part in the preparation of the statute of frauds. His biographer, Mr. Wynne, says that he was absent from England, on a foreign mission, for nearly four years, from December, 1675.² But it seems to be evidenced by abundant authority that the statute was in course of preparation long before that period.

As Sir Leoline Jenkins was considered able authority in probate law, the sections of the statute of frauds in relation to wills may be reasonably ascribed to him. In fact, the ninth report of the Historical MSS. Commission, recently published in England, declares that he drew the sections of the statute upon that subject.³

The influential courtier, Lord Guilford,⁴ keeper of the great seal under Charles the Second, had something to do in preparing certain sections of the statute, and also did efficient service in furthering its passage through parliament; although neither Lord Campbell, nor Macaulay, accord to him a very high place on the roll of jurists.⁵

§ 8. The sections relating to trusts and devises of land are believed to have been drawn by Lord Chancellor Nottingham. True it is, that in promoting the passage of the bill, at least, he took an active and conspicuous part. This is evidenced not only from the recent report of the Historical MSS. Commission, but from the carefully considered opinion of Lord Nottingham, which was discovered by Lord Eldon in 1823, and which is reported in *Ash v. Abdy*.⁶ He

¹ James Schouler in *Am. Law Review* for May-June, 1884.

² Wynne's *Life of Sir Leoline Jenkins*, vol. 1, pp. 3, 53, published in 1734. He was abroad on his Nimeguen mission from December, 1675, to August, 1679.

³ See the *Irish Law Times*, December 6, 1884.

⁴ Roger North's *Life of Guilford*, vol. 1, p. 108, published in 1740. He was a brother of Roger North, the biographer.

⁵ 3 Campbell's *Lord Chancellors*, 491; 1 Macaulay's *Hist. of England*, ch. 2.

⁶ 3 Swanston's *R.*, 664 (1823).

says: "I had some reason to know the meaning of this law, for it had its first rise from me, who brought the bill into the house of lords, although it afterwards received some additional improvements from the judges and the civilians." Of the principle and policy of the statute of frauds Lord Nottingham is said to have declared, with parental pride, that every line was "*worth a subsidy*."¹

Contemplating the extensive litigation which its "ambiguous language" has caused, says Taylor in his work on evidence, it may be added "that every line of it has *cost a subsidy*." This blame, however, he declares, must be converted into unqualified praise, if regard be had to the objects which it seeks to attain, and which it has, in fact, to a great extent attained.²

Mr. Kent, in his commentaries, published in 1827, observes that "it was said at Westminster Hall, upwards of sixty years ago, that the statute of frauds had not been explained at a less expense than £100,000 sterling. I should suppose, from the numerous questions and decisions which have since arisen upon it, that we might put down the sum at a million and upwards."³

The reporter, Mr. Swanston, in *Ash v. Abdy*, *supra*, says: "No one of the popular conjectures concerning the history of this celebrated statute refers its origin to Lord Nottingham. That fact seems placed beyond doubt by the account in the text; and there may have been some foundation for the tradition that Sir Matthew Hale and Sir Leoline Jenkins assisted in its preparation."⁴

¹Roger North's Life of Guilford, 209. This opinion is adopted by the lord chancellor in *Popham v. Eyre*, Lofft, 786.

²See 1 Greenl. Ev., 262; 2 St. Ev., 472; *Rann v. Hughes*, 7 T. R., 350, n; *Burrill v. Tuessell*, 4 Taunt., 121.

³2 Kent's Com., ed. 1827, p. 408, note.

⁴Lord Nottingham was called the

father of equity, and yet it is said that he worshiped Sir Matthew Hale as his master. Lord Hale considered equity as part of the common law, and one of the grounds of it, and, as far as possible, he reduced it to certain rules and principles, that men might study it as a science and not think the administration of it had anything arbitrary in it.

§ 9. Traditional history and careful research agree that the statute of frauds was several years in course of preparation. The bill seems to have been introduced in the commons for the first time in the session of 1673, and was brought in again in 1675, when it went into committee, where certain alterations and omissions were made. At the following session, January 19, 1676, it was read in the house of lords. The bill was then referred to a committee, consisting of thirty-seven temporal and ten spiritual peers, "assisted by the lord chief justice of the common pleas, Justices Windham, Jones and Scroggs;" and on the 6th day of March following, the Earl of Dorset reported that the committee had met several times and were of opinion that "the bill was fit to be engrossed, with some amendments."

Upon being again presented in the commons it was referred to a committee of over fifty members, including the master of the rolls, and all the members of the house "who were of the long robe." The bill underwent certain changes at the hands of this committee, when it was returned to the house of lords, where, on the 16th day of April, 1677, it received the royal assent.¹

From this brief outline, the conclusion will not escape the mind of the student, that after being prepared by able jurists, and amended and passed upon by several competent committees, the statute of frauds came from the hands of parliament full-freighted and luminous with judicial knowledge and wisdom.

§ 10. Although the statute of frauds was prepared by able jurists, and revised and perfected by several committees, some writers have seen fit to inveigh against it as ex-

¹The statute of frauds went into effect, according to its enacting clause, on the 24th day of June, 1677.

The Cambridge edition of the British Statutes at Large dates the acts of 29 Car. II. as of 1676; while

the "Statutes of the Realm," printed under the authority of parliament, in 1819, gives the date as of 1677.

The year, 29 Car. II., is, properly speaking, 1676-1677, the parliamentary year.

hibiting an obscurity of arrangement, and as being inexact and inconsistent in phraseology.¹

Lord Denman, while pronouncing the statute one of the wisest laws in principle, considered it far from being complete in its details, or fortunate in its execution.²

Baron Bramhall, in *Noble v. Ward*,³ said that he did not consider the expression, "allowed to be good," a very happy one. The hesitation apparent in the minds of the authors, says an able writer, appears to have been due to the want of a perfectly distinct conception of a contract, and of the difference between a written contract and written evidence of a verbal contract. The latest adverse criticism upon section 17 is by Mr. Justice Stephen, in the *Law Quarterly Review* for January, 1885. The obscurity, he says, lies mainly in the use of four very common expressions: "contract for the sale of good," "goods," "note or memorandum in writing of the bargain," "signed." He says that section 17 sins against several of what ought to be the well-recognized rules of all rational legislation, viz.: It establishes a highly artificial rule about a very simple matter; it is a relic of times when the best evidence on such subjects was excluded on a principle now exploded; and it is, as the multitude of cases decided upon it clearly show, obscure in reference to the subject to which it relates.

§ 11. An able writer on the law of evidence observes that the statute of frauds is drawn in so inartificial a manner as to confer little credit on the skill of the draftsman.⁴

¹ *Right v. Price*, 1 Douglas, 241 (1779), note; *Buckeridge v. Ingram*, 2 Vesey, 662; *Wyndham v. Chetwynd*, 1 Burr., 418; *Browne on Statute of Frauds*, introductory chapter; *Wilson v. Watts*, 9 Md., 460; *Lamborn v. Watson*, 6 Harr. & John., 255.

² *Doe v. Harris*, 8 Ad. & E., 12.

³ L. R. 1 Ex., 117; *Browne on Statute of Frauds*, § 115, n. The Massachusetts statute reads "Shall

be good or valid;" "Shall be binding," says the Arkansas statute; "Shall be good," reads the Florida statute; Connecticut the same; "Shall be valid," says the statute of Indiana; "Allowed to be good," says Colt, J., in *Townsend v. Hargraves*, 118 Mass., 334, "means good for the purpose of a recovery under it."

⁴ *Taylor on Ev.*, § 1000.

Mr. Justice Best, at *nisi prius*, once said that the statute was much objected to at the time of its passage, and that judges appeared *anxious to get rid of it*, but that in later times they became desirous of giving to it its full effect.¹ This piece of criticism, written over a century and a half after the statute of frauds was passed, does not seem to be supported by authority, contemporaneous with or immediately subsequent to its passage, and may, without seeming harshness, be regarded as *obiter dictum*. Lord Kenyon declared that the statute of frauds is "one of the wisest laws in our statute book."² And Abbott, C. J., expressed the opinion that it was a highly beneficial and remedial statute, and that it should be so construed as to further the object and intention of the legislature, which was *the prevention of fraud*.³

This meritorious law applies with singular wisdom and beneficence to the daily contracts and practical affairs of mankind, relieving them of vagueness and uncertainty, and checking, to some extent, the restless and reckless spirit of litigation.

"I think the statute of frauds," said Best, C. J., "is a good and wholesome statute."

§ 12. While it is true that the judges in the early history of the statute of frauds experienced embarrassment in interpreting some of its provisions, there does not seem to have existed any great repugnancy to it. Nor were there valid reasons why they should evade, or seek "to get rid of it;" for the statute fixed and settled many legal principles, which, before its enactment, were a source of much judicial vexation. It seems clear, at least, that section 17 tended to lighten the burdens of the courts, in relieving them of the task and responsibility of deciding perplexing questions arising under contracts which rested simply in parol.

The conflict of opinion in regard to the statute arose, no

¹ Proctor v. Jones, 2 Carr. & P., 532; Mead v. Case, 33 Barb., 206, Smith, J.

² Chaplin v. Rogers, 1 East, 194.
³ Baldey v. Parker, 2 Barn. & Cres., 37; 9 Eng. C. L. R., 16.

doubt, on account of the belief of some of the judges that it had the indirect effect to create a new species of contracts, intermediate between specialties and parol agreements, partaking so far of the former as to avoid the necessity of a consideration.

Thus, in *Pillans v. Van Mierop*,¹ Lord Mansfield (1765) declared, in effect, that there was no such thing as a *nudum pactum* in writing, and that "the ancient notion about want of consideration was for the sake of evidence only, for where it was reduced to writing, as in covenants, specialties, bonds, etc., there was no objection to the want of consideration;" and that "the statute of frauds proceeded upon the same principle." But that case has long since been overruled in England and in this country.

This question was set at rest in *Rann v. Hughes*,² which held that a written contract not under seal was merely a parol agreement, the consideration of which must be averred and proved; that "the law of this country supplies no means, nor affords any remedy, to compel the performance of an agreement made without sufficient consideration; such agreement is *nudum pactum ex quo non oritur actio*."

The embarrassments of the courts, and the expensive litigations, in interpreting the seventeenth section of the statute, were due also to the fact that the matters to which it relates directly affect the important interests of ordinary business life.

The earlier decisions sought to give literal and technical meaning to its provisions and so came in collision with the habits and usages of trade and commerce. But the more modern interpretation of statutes has been to give to the words their customary acceptance, a broader and more rational construction.

Considering the many old-time rules and usages which the statute of frauds supplanted, it is not surprising that difficulties in construing it should have arisen; nor is it rea-

¹ 3 Burr., 1663.

P. C., 550. See, also, *Sears v. Brink*,

² 4 Brown's Par. Cas., 27; 7 Bro. 3 Johns. (N. Y.), 210.

sonable to expect that a statute so comprehensive and far-reaching should be entirely free from inaccuracies.

Human wisdom, says Mr. Justice Story, never yet has achieved anything perfect, and the most that can be expected from the most enlightened jurisprudence is, that it shall contain within itself near approximations to the soundest equity and moral justice, and in its adaptations be fitted to the wants, the spirit and the policy of the age.¹

§ 13. Before the enactment of the statute of frauds there existed no adjudication requiring executory contracts to be evidenced by writing. The common law recognized the validity of verbal contracts of sale of goods and chattels for any amount, however proven; but such contracts rested upon parol proof, and therefore were open to the mischief of fraud and falsehood. This the statute aimed to remedy. While it is true that certain laws under the Anglo-Saxon princes, and the codes of some of the northern nations, contained prudential and protective rules and regulations against frauds and perjury, it is also true that many of these provisions had fallen into desuetude, which the statute of frauds in part revived. This reformation, in the *modes of proof*, was salutary. It was demanded by the circumstances of the times, and was admirably adapted to the improved condition of society and the habits of the trading community.² The statute dispenses with no evidence of consideration which was previously requisite, and gives no efficacy to written contracts which they did not

¹ Story on Part., 463.

² An interesting account of the early laws on this subject may be found in Roberts on Frauds; Browne on the Statute of Frauds, and in Greenl. on Evidence (10th ed.), 262, n. The French law, by the *Ordonnance de Moulins*, A. D. 1566, confirmed by act of 1667, parol or verbal evidence was inadmissible in all cases where the sub-

ject-matter of the action exceeded the value of one hundred livres (a livre being 18½ cents). The Roman law also required written evidence in a great variety of cases, embracing nearly all the subjects contained in the statute of frauds. These are enumerated by N. De Lescut, *De Exam. Testium*, cap. 26; Farenac, *Oper. Tom.*, 2 App., 243.

formerly possess, but requires, under certain conditions, *more positive evidence than mere oral testimony.*

Section 17 of the statute of frauds, 29 Car. II., reads as follows, *verbatim et literatim*: "And bee it further enacted, by the authority aforesaid That from and after the said fower and twentyeth day of June noe contract for the Sale of any Goods, Wares or Merchandises for the *price of ten pounds* Sterling or upwards shall be allowed to be good except the Buyer shall accept part of the Goods soe sold and actually receive the same or give something in earnest to bind the bargaine or in part of payment, or that some Note or Memorandum in writing of the said bargaine be made and signed by the partyes to be charged by such contract or their Agents thereunto lawfully authorized."

§ 14. The statute passed 9 George IV. (1828), familiarly known as Lord Tenterden's act, declares that *the provision of the statute of frauds shall extend to all contracts for the sale of goods to the value of 10l. sterling and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not, at the time of the contract, be actually made, procured or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery.* This statute set at rest the vexed question, which had before existed, as to executory contracts for the sale of goods, etc. It is well settled that Lord Tenderden's act, which in England is read in connection with the seventeenth section of the statute of frauds, includes contracts for goods to be manufactured at a future time, or otherwise, not in a condition to suit the wishes of the purchaser, or fit for delivery, at the time of the making of the contract.¹

§ 15. The principal English cases, which held that exec-

¹ *Humble v. Mitchell*, 11 Ad. & Com. B., 587 (1856); 25 L. J. C. P., El., 205; *Scott v. Eastern Counties Railway Co.*, 12 M. & W., 53; *Tempest v. Kilner*, 3 C. B., 249; 3 M. G. & S., 251; *Harmon v. Reeve*, 18 257; *Bowlby v. Bell*, 3 C. B., 284. No similar law to that of Lord Tenterden's has ever been enacted in the United States.

utory contracts should be excluded from the operation of the statute of frauds, are *Towers v. Osborne*,¹ in 1724; *Clayton v. Andrews*,² in 1767, and *Groves v. Buck*,³ in 1814. Cases holding the opposite view are *Rondeau v. Wyatt*,⁴ in 1792; *Cooper v. Elston*,⁵ in 1796, and *Garbutt v. Watson*,⁶ in 1822. In *Bennett v. Hull*,⁷ a New York case, decided in 1813, arising under the fifteenth section of the statute of frauds of that state (which was then the same as the seventeenth section of the English statute), it was held that the section applied as well to executory as to other contracts; since which time the decisions in that state have been quite uniform on that subject.⁸

§ 16. Whilst the consideration of the bargain under the old common law was the immediate *payment* of the price, under the more modern decisions it is held that the consideration may be the *purchaser's promise* or *obligation to pay*.

A fair illustration of the common law doctrine is given in Sheppard's Touchstone: If one sells me his horse or any other thing for money, or other valuable consideration, and *first*, the same thing is to be delivered to me at a day certain, and by our agreement a day is set for the payment of the money; or, *secondly*, all; or, *thirdly*, part of the money is paid in hand; or, *fourthly*, I give earnest money, albeit it be but a penny, to the seller; or, *lastly*, I take the thing bought by agreement into my possession, where no money is paid, earnest given, or day set for the payment, in all these cases there is a *good bargain and sale of the thing to alter the property thereof*.

In the *first* case, I may have an action for the thing, and

¹ 1 Strange, 506. See *Watts v. Friend*, 10 B. & C., 446.

² 4 Burr., 2101.

³ 3 M. & S., 178.

⁴ 2 H. Bl., 63.

⁵ 7 T. R., 14.

⁶ 5 B. & Ald., 613.

⁷ 10 John. (N. Y.) R., 364.

⁸ *Crookshank v. Burrell*, 18 John. (N. Y.) R., 59; *Jackson v. Covert*, 5 Wend., 139; *Outwater v. Dodge*, 6 Wend., 397; *Sewall v. Fitch*, 8 Cow., 215; *Merritt v. Clason*, 12 John., 102; and 14 id., 484, in error; *Vincent v. Germond*, 11 id., 283.

the seller for his money; in the *second*, I may sue for and recover the thing bought; in the *third*, I may sue for the thing bought, and the seller for the residue of the money; in the *fourth*, where earnest is given, we may have reciprocal remedies, one against another; and in the *last* case, the seller may sue for his money.¹

§ 17. In *Simmons v. Swift*,² it was held that where a bargain is made for the purchase of goods, and nothing is said about payment or delivery, the property passes *immediately*, so as to cast upon the purchaser all future risk, if nothing remains to be done to the goods, although he cannot take them away without paying the price. It may be laid down as an almost universal rule, that in all agreements there must be *quid pro quo* presently, except a day be expressly fixed for the payment; otherwise it is *nothing but communication*.³

§ 18. For over a century after the statute of frauds was passed, one of the questions which embarrassed the courts was, whether sales of goods, wares or merchandise by auction properly fell within its operation; although this mode of selling personal property had existed in Great Britain, for centuries prior to the reign of Charles the Second.

Lord Mansfield, as late as 1766, declared that the solemnity of auction sales precluded the possibility of perjury as to the fact itself of sale, and accordingly he was led to the

¹ William Sheppard's *Touchstone of Common Assurances*, pp. 224, 225. Mr. Justice Doderidge, according to reliable authority, was the author of the *Touchstone*. See Mr. Hilliard's and Mr. Preston's preface to that work. Mr. Edward Hilliard, of Lincoln's Inn, in 1780, edited the work, and a distinguished conveyancer, Mr. Booth, wrote the following on its title page: "No part of this book is Sheppard's but the title, for it was originally wrote by Justice Doderidge, whose library Shep-

pard purchased, where, among other books, he found the original manuscript of this treatise, and afterwards published it as his own. Sir Creswell Levinz had seen the manuscript in Justice Doderidge's hands, and from him Mr. Pegott, who was my author, had this information." See, also, *Law Magazine*, vol. 1, page 561, note 1.

² 5 B. & C., 862; *Dixon v. Yates*, 5 B. & Ad., 313, 340.

³ *Noy's Maxims*, 87, 89; *Macomber v. Parker*, 13 Pick., 183.

inclination that auctions in general were not within the statute.¹ In this view Justices Wilmot and Yates concurred.

These opinions were written after mature consideration. Lord Mansfield's decision seems to have been based upon the theory that section 17 was only intended to extend to the mischief created by *private and clandestine contracts*. It was left for Lord Ellenborough, in *Hinde v. Whitehouse*,² to compass the true bearing, remove all doubts, and settle the law on that question. The courts, since that case, have uniformly recognized the language of that section as clearly justifying his interpretation. In that case certain sugars were sold at auction, according to a printed catalogue, with the conditions of sale. The auctioneer wrote down in the same line with the lots purchased, the name of the buyer, and the price. It was objected that the whole contract must appear upon the paper signed, with the names of the defendants; that the conditions of sale, which formed a material part of the contract, were not signed, nor in any way connected, except by parol testimony; and the mere writing on the catalogue — having no reference to the conditions of sale — was not a memorandum within the meaning of the statute of frauds. But the sale was held to be complete, however, on the ground that the samples, which had been treated as part of the bulk, were to be considered as "part of the goods sold, accepted and actually received as such by the buyer," within the words of the statute.

Lord Ellenborough said: "With all deference to these opinions (referring to the decision of Lord Mansfield and the other judges, in *Simon v. Metevier*, *supra*), I do not at present feel any sufficient reason for dispensing with the express requisition of a memorandum in writing, in a statute applying to all sales of goods above the value of 10*l.*, without exception, merely because the quantum of parol evi-

¹ *Simon v. Metevier*, 1 W. Black., 599; but in *Blagden v. Bradbear*, the statute does not extend to such sales."

² *Vesey*, 466, the court said: "I should hesitate to say the policy of 27 East, 558 (1806).

dence in the case of an auction is likely to render the danger of perjury less considerable."

The court, in *Kenworth v. Scofield*,¹ recognized and followed the rule laid down by Lord Ellenborough. Mr. Justice Holroyd, delivering the opinion of the court, said: "Upon the authority of *Hinde v. Whitehouse*, I both think that *auctions of goods are within the statute of frauds*, and that there has not been a signature to a memorandum of the bargain sufficient to satisfy the seventeenth section of that act."

The language of the seventeenth section seems broad enough to comprehend every species of contract, whether made in the ordinary way between individuals, clandestinely, or by bidding at an auction sale in presence of many people.

§ 19. In view of the controlling influence that the legislature has had in modern times over jurisprudence, it may be said that it has quite supplanted the chancellor in respect to contracts. In ancient times the chancellors dispensed justice according to the dictates of their conscience, or, as it used to be said, according to the length of the chancellor's foot, unfettered by rule or precedent; they did not hesitate to ignore acts of parliament, and even assumed to put such construction upon contracts as they deemed prudent men should make, rather than to interpret the contract as they found it. But the more modern tendency of the courts has been to so construe contracts as best to carry out the intention of the parties, and not to assume to know the business of the people better than the people know it themselves.

In the case of *Wallis v. Smith*,² Cotton, L. J., said: "I quite agree with the master of the rolls, that the sounder view to take is this: to leave people who are competent, and

¹ 2 Barn. & Cres., 945; Sugden on Vend. & Pur., ch. V, § 6; Chitty on Contracts, 272, and Kent's Comm., vol. 2, p. 540.

² 21 Chy. Div., 266.

See, also, *Printing and Numerical Registering Co. v. Sampson*, L. R., 19 Eq., 465.

under no disability, to make their own contracts, and then to act on those contracts, whatever the true interpretation might be, without assuming on behalf of the courts, either of law or equity, to say, 'This is unreasonable and we will make another and different contract between the parties. They did not mean what they have said in their contracts.'"

§ 20. Formerly, contracts seem to have been considered of small importance compared with what they have since assumed; the real intention of the contracting parties was held to be subservient to the particular form and ceremony. But in later times, however, contracts are properly construed, as far as practicable, to conform to the intention of the parties, as gathered from the contract. *Contractus legem ex conventionem accipiunt.*

§ 21. The more modern interpretation of the seventeenth section has been broad; and refined distinctions have not been resorted to in order to bring a contract within its operation.

Abbott, C. J. (afterward Lord Tenterden), as early as 1820, held that the statute of frauds should be *reasonably* construed.¹ Take a simple case wherein he rendered judgment. *Howe v. Palmer*² was an action for an alleged breach of contract in not accepting twelve bushels of winter tares. The plaintiff was a grower of tares residing at Pergo. He sent his nephew to Romford Market with a sample of his

¹ Lord Tenterden evidently believed with Bacon, that the office of the judge is *jus dicere*, and not *jus dare*, to interpret law and not to make law; and to suppress force and fraud. He did not believe in hard constructions or strained inferences.

Of the principles governing his decisions Mr. Justice Talfourd, with discriminating praise, says: "The chief peculiarity and excellence of his decisions consist in the frequent introduction of the word '*reason-*

able' into their terms. He so applied this word as in many instances to relax the severity of legal rules, to mediate happily between opposing maxims, and to give a liberal facility to the application of the law by judges and juries to the varying circumstances of cases, which before had been brought into a single class." 4 Camp. Lives of the Chief Justices, 347.

² 3 Barn. & Ald., 321; Baldey v. Parker, 2 B. & Cres., 40 (1823).

tares. The defendant there verbally agreed to buy "twelve bushels of tares at 1*l*. per bushel;" and to send to the plaintiff's farm for them, declining at the time to take the sample which was offered, but requested that the tares remain with the plaintiff until he wanted to sow them, which was agreed to. The plaintiff's nephew, upon returning to the plaintiff's granary, measured out the twelve bushels of tares and set them apart, and gave orders that they be delivered to the defendant when he should call for them. There was no memorandum in writing, nor anything paid on account of the contract. The plaintiff had a verdict, with liberty to the defendant to move to enter a nonsuit; a rule *nisi* having been obtained for that purpose.

Abbott, C. J., writing the opinion of the court, said, after remarking that the statute of frauds is one of the most important and beneficial statutes to be found in the books (quoting the seventeenth section), that there was no memorandum in writing of the contract and nothing given in earnest or in part payment; "unless, therefore, the buyer has accepted and received part of the goods so sold, this case is within the statute, and no action can be brought." He thought the case came within the very words of the statute, to which full effect ought to be given, and not suffer its beneficial provisions to be evaded by *subtle distinctions*.¹

Best, J., in the same case, thought the plaintiff was prevented from recovering, both by the spirit and the letter of the statute: "The spirit I take it to be this, that a contract

¹ See *Astey v. Emery*, 4 M. & S., 262; *Alexander v. Comber*, 1 H. Bl. R., 20; *Tempest v. Fitzgerald*, 3 Barn. & A., 680, and cases there cited. The above case, *Howe v. Palmer*, differs from *Chaplin v. Rogers*, 1 East, 192, for there was sufficient evidence in this case for the jury to draw the conclusion of an acceptance, inasmuch as the vendee had dealt with the hay as his own. And differs from *Elmore v. Stone*, 1 Taunt., 458, in that the buyer directed expense to be incurred; and the directing of that expense was considered evidence of an acceptance on his part; there it was agreed that the horse should be transferred from the sale to the livery-stable, and the expense was paid by the purchaser for the keep, which could not be unless the horse was supposed to have come into his possession.

shall not be binding unless there be some act done which directly shows an acceptance on his part."

§ 22. It has been held by a series of well-considered cases, that the benefits under the statute of frauds will be most effectually secured by rejecting refined distinctions, overlooking the supposed equity of particular cases, and adhering steadily to the language of the statute, as the best exponent of the intention of the legislature.

A distinguished American judge said in an important case, that the statute has required only contracts of *sale* to be in writing, and that where work and labor has entered in any material degree into the creation of the thing bargained for, so as to make it doubtful whether it is a contract of sale or not, courts are not called upon to find *nice distinctions*, or resort to rigid rules of interpretation that it may be brought within the operation of the statute. *Jus summum sæpe est malitia* is the observation of the Latin poet; and on the authority of Lord Coke, the poets are cited as authorities in expounding the law: *Authoritates philosophorum medicorum et poetarum sunt in causis allegandæ et tenendæ*.¹

§ 23. It has been truly said that statute law and common law originally flowed from the same fountain, the legislature. Statute law is the will of the legislature. The common law is nothing else but statutes worn out by time; all our law begun by consent of the legislature; and whether it is now law by usage or by writing, it is the same thing.

Sir Matthew Hale has observed that statute law, or acts of parliament, are of two kinds: First, those statutes which were made *before* time of memory; and secondly, those statutes which were made within, or *since*, the time of memory.

Statutes, or acts of parliament, which existed before the beginning of the reign of King Richard I. (1189), and never

¹The Passaic Manufacturing 118; *Shindler v. Houston*, 1 Com-
Company v. Hoffman, 3 Daly's R. stock (N. Y.), 266; Co. Lit., 264.
(N. Y. C. P.), 495; 11 Am. L. Reg.,

repealed, are accounted part of the *lex non scripta*, and are part of the common law; that is, they are deemed to be *before* time of memory.¹

The *lex scripta*, or acts of parliament, which were made since the reign of Richard I., are, in a legal sense, understood to be written, or since time of memory. These are called "old statutes," and are those statutes which were passed between the time of Richard I., and Edward III. What Sir Matthew Hale calls "new statutes" are those statutes beginning with the reign of Edward III., and are extant upon record, either in parliament rolls or in the statute rolls of King Edward III., and those kings that came after him. These acts and the petitions themselves, for the most part, are supposed to be preserved and extant. This brief survey may serve to rescue from forgetfulness the line of demarcation between what is commonly understood as the written and the unwritten law.

¹ Com. Dig., 4 vol., 334; 2 Bl. Com., 31; Lord Chief Justice Wil-
mot, in *Collins v. Blantern*, 2 Wils.,
348, 1 Smith's L. C., 325; Sir Mat-
thew Hale's History of the Com-
mon Law by Runnington (1792) ch.
I, 1 Kent, 472.

CHAPTER II.

OF CONTRACTS WITHIN AND CONTRACTS WITHOUT THE STATUTE OF FRAUDS.

- § 24. Of the changes wrought by the statute of frauds.
- 25. The statute of frauds of the several states.
- 26. Of bargain, sale and contract.
- 27. Construction of statutes.
- 28. What contracts fall within the operation of the statute of frauds; distinctions as to.
- 29. Contracts of sale of goods in existence and non-existence.
- 30. Rule of construction of contracts in Massachusetts and some other states.
- 31. Illustration of the rule; *Mixer v. Howarth*.
- 32. Of the cases of *Lamb v. Crafts*, and *Clay v. Yates*.
- 33. Of contracts of sale and manufacture.
- 34. The same subject continued; a Colorado case.
- 35. The case of *Gardner v. Joy*.
- 36. The case of *O'Neil v. New York and Silver Peak Mining Company*.
- 37. Sale, work and labor; *Finney v. Apgar*.
- 38. The same subject continued.
- 39. The case of *Meincke v. Falk*.
- 40. When the contract is substantially for goods; *Pitkin v. Noyes*.
- 41. Contract for goods when labor is to be bestowed.
- 42. The words "no contract for the sale of;" constructions of.

§ 24. The subject applicable to this treatise is the statute of frauds, in relation to contracts for the sale of goods, wares and merchandise; chattels and things in action; and personal property generally.

The enactment of the statute of frauds wrought several important changes in the common law.

It introduced a new rule of evidence.

It improved the methods of trade and commerce.

It has been a safeguard against perjury in the ordinary transactions of business.

Under its influence, also, in the more modern interpretation of contracts for the sale of goods, chattels, etc., the trend of the decisions has been to carry out the intention of the parties.

Although much diversity of opinion has existed as to what contracts fall within its operation, it may be said, after ages of forensic discussion and judicial discrimination in England and in this country, that where the language of the statute of frauds is the same, the decisions are quite reconcilable and harmonious.

§ 25. The words of section 17 of the English statute of frauds are in part as follows: "No contract for the sale of any goods, wares or merchandises for the price of ten pounds sterling." Lord Tenterden's act substituted the word *value*, in place of the word "price."¹

The language of the statute of frauds of several states is the same, and in others is similar to the English statute.

For instance, in Arkansas, Georgia, Massachusetts, Maine, Maryland, Michigan, Missouri, New Hampshire, New Jersey, South Carolina and Vermont, the language of the statute is, "Contract for the sale of goods, wares and merchandise."

In Arizona, Dakota, California, Minnesota, Montana, Nebraska, Nevada, New York, Wisconsin and Wyoming territory, the words, "Contract for the sale of goods, chattels or things in action," are used. The section of the statute of frauds of Alabama, which also contained the same language, was repealed in 1862.

In Connecticut, Iowa and Oregon, the words are, "Agreement for the sale of any personal property;" while in Indiana, the words "Contract for the sale of any goods;" and in Florida, the words "Personal property, goods, wares or merchandise," are used in the statute of frauds.

¹ In 9 Geo. 4, ch. 14, sec. 7. In (Wis.), 271; *Cason v. Cheely*, 6 Ga., 554. In *Robertson v. Vaughn*, 5 Sandf., 1, the expediency of such a statute was urged; but see *Sewall v. Fitch*, 8 Cow., 215.

§ 26. In general, the word “bargain” denotes the terms upon which a sale is made; and “sale” expresses or implies the completion of the bargain and the transfer of the property from one person to another. A contract for the sale of goods, wares or merchandise is an agreement or covenant between two or more persons, in which each party thereto binds himself to do or forbear some act, and each acquires a right to what the other promises; a mutual promise. All this implies persons able to contract; their mutual assent; property to be contracted for, and a price for the same, to be paid in money.¹

Money in some form has been used in all civilized nations from a very early period. Thus, for instance, it is said that “four hundred shekels of silver, current money with the merchant,” was paid for the field of Machpelah (Genesis, chapter xxiii, verses 16, 17).

In the construction of contracts the intention of the parties is to be sought for, over and beyond the mere form of the words used.

Under the English decisions, the word “bargain,” in the seventeenth section of the statute of frauds, is construed as not requiring as strict a statement of the transaction necessary as the word “agreement” in the fourth section.²

§ 27. One cardinal rule, which those who legislate on the common business of life ought always to bear in mind, says Mr. Justice Stephen, is that the power of law to control conduct is small, and is constantly exaggerated.³

Laws ought to be adjusted to the habits of society, and not to aim at remoulding them. The cases in which any law is actually enforced are infinitesimally small in number

¹ *Bigler v. Hall*, 54 N. Y., 167; another, and by which the other *Morse v. Sherman*, 106 Mass., 430; promises to pay a price for such goods when they are made, is a contract for the sale of goods.”
² *Egerton v. Matthews*, 6 East, 307.
³ *Law Quarterly Review*, January, 1885.

in comparison with those in which it has no effect whatever. Custom, and what is called common sense, regulate the great mass of human transactions.

In seeking to reach the intention of the legislature as to what contracts are embraced under the words goods, wares and merchandise, and chattels, and things in action, a review of some of the early authorities will be found useful. For, as Lord Coke somewhere says, great regard should be paid to the construction which the sages of the law, who lived about the time a statute was made, put upon it, because they were best able to judge of the intention of the makers at the time when it was made. *Contemporanea expositio est optima et fortissima in lege.*

Under the well established authorities, it may be said, in construing the language of any statute, the intention of the law makers is to be sought for. This is the grand central light by which all statutes should be read. And the cognate rule runs through all the cases, that a statute is to be so construed as to give sense and meaning to every part.¹

§ 28. In general the cases have drawn three distinctions in relation to contracts for the sale of goods, chattels and personal property generally: 1st. Contracts which are entirely executory; 2d. Contracts for a merchantable article not in existence, but which the vendor is to manufacture and deliver at a stated time and price; and 3d. Contracts for the making of an article where the vendor is to blend together his compensation for labor, skill and materials so that they cannot be discriminated.

Cases arising under the second class, declared within the statute, fall more directly within what may be called the Massachusetts and English rule. The same rule in effect obtains in Wisconsin and New Jersey.

¹Ewing v. Bennet, 11 Peters R., Hun, 559; Lake Shore & Mich. S. 41; Gyger's Estate, 65 Penn. St., R'y Co. v. Roach, 80 id., 339; Cush- 311; People v. N. Y. & Manhattan ing v. Worrick, 9 Gray, 382; Lude- Beach R'y Co., 84 N. Y., 565; Eys- wig v. Pariser, 4 Abb. N. C., 246; ton v. Studd, 2 Plow., 465; Brown Innes v. Purcell, 2 Supm. (T. & C.), v. Clark, 77 N. Y., 369, aff'g 16 538.

The decisions of New York and some other states quite uniformly hold that the words of the statute mean goods *in solido* at the time the contract is made. Executory contracts are now uniformly held to be within the statute of frauds, though some of the early English cases held that they were not. One of the earliest cases involving this question was *Bennett v. Hull*.¹ There the defendant agreed to deliver to the plaintiff, on board his vessel, one hundred barrels of apples, and then to be paid for. On appeal from the judgment in favor of the plaintiff, it was held that the case was clearly within the statute; that the statute applied as well to executory as to other contracts. The court declared that the sound and just construction of the statute of frauds was enunciated in *Rondeau v. Wyatt*,² and in *Cooper v. Elston*.³

On the other hand, some cases have held that, where the contract is for the manufacture of an article, and work is to be bestowed upon it to complete it according to the contract, it is without the statute.⁴ Contracts arising under the third class are uniformly held to be without the statute of frauds.

§ 29. When the contract is for the sale of goods, or an article in existence, there is, nautically speaking, deep water and clear sailing; but it is in the "border cases," so-called, where the courts encounter breakers,—experience embarrassment.

If the contract be for the manufacture of an article upon a special order, as already indicated, and the essence of the contract is the particular skill which the manufacturer possesses, or is supposed to possess, it is for work and labor, and not within the statute of frauds.⁵ It is well said in

¹ 10 John., 364 (1813).

² 2 H. Bl., 63.

³ 7 Term R., 14.

⁴ *Sewall v. Fitch*, 8 Cow., 215

(1828); *Parsons v. Loucks*, 48 N. Y.,

19 (1871), 216, and cases there cited;

Higgins v. Murray, 73 id., 252

(1878); *Frank v. Harrington*, 36 Barb., 415; *Smith v. N. Y. C. R.*

R. Co., 41 N. Y., 620.

⁵ *Goddard v. Binney*, 115 Mass.,

450; *Hight v. Ripley*, 19 Me., 137

(1841); *Ferren v. O'Hara*, 62 Barb.,

517 (1862); *Abbott v. Gilchrist*, 38

Rogers v. Stevenson,¹ that an agreement legal and actionable before the statute of frauds was passed is legal and actionable still; for the statute simply introduced a new rule of evidence. But in some states the statute declares the contract "void" unless it complies with the statute of frauds.

§ 30. The rule applicable to contracts for the sale of goods, wares and merchandise as established by the decisions of Massachusetts, New Jersey, Wisconsin and some of the other states, is in effect as follows: If the articles to be manufactured under the contract will, at the time agreed upon for their delivery, constitute what may be denominated marketable commodities, the contract is of sale.

In this regard the English decisions are in accord.

The real test, however, in those states, whether the contract is one of sale or for work and labor, does not depend upon the existence or non-existence of the article at the time the contract is made, but whether the manufacturer produces the article in the usual course of his business, as contradistinguished from a manufacture under a special order. Contracts falling within the former class are deemed contracts of sale; those under the latter class are held to be contracts for work and labor, and not affected by the statute of frauds.

§ 31. The decision of Chief Justice Shaw in the early case of *Mixer v. Howarth*² is probably the most authoritative, if not the earliest, expression of the Massachusetts rule. The plaintiff was a carriage-maker. The defendant, at Mixer's shop, selected the style of carriage he wanted. The body of the carriage in question was in nearly a finished condition, but it had to be lined and completed in other respects. Mixer proceeded to line and finish the carriage as

Me., 260; *Crockett v. Scribner*, 64 109; *Downs v. Ross*, 23 Wend. (N. id., 447; *Prescott v. Locke*, 51 N. Y.), 270.
H., 98; *Gorham v. Fisher*, 30 Vt., 16 Minn., 68.
428; *Smith v. Fisher*, 3 N. E. Rep., 21 Pick., 205 (1838).
824; *Phipps v. McFarlane*, 3 Minn.,

ordered, and when it was ready for delivery he gave notice of the fact to Howarth with the request that he would take the carriage away, but he refused to accept it.

On substantially these facts the court decided that no property passed to the defendant; that the carriage contemplated to be sold did not then exist; that it was to be constructed from materials, partly wrought indeed but not put together. "It was, therefore, essentially an agreement by the defendant with the plaintiff to *build a carriage* for him," said the court, "and on his part to take it when finished and pay for it at an agreed, or at the reasonable, value. This is a valid contract, and made on a good consideration, and therefore binding on the defendant. But it was not *a contract of sale*, within the meaning of the statute of frauds, and therefore need not be proved by a note in writing." The learned chief justice there declared the rule to be that, when the contract is for an article then existing, or such an article as the vendor "*usually* has for sale in the course of his business, the statute applies." . . . "But where it is an agreement with a workman to put materials together and construct an article for the employer, whether at an agreed price or not, though in common parlance it may be called a purchase and sale of the article, to be completed in the future, it is *not a sale* until an actual or constructive delivery and acceptance." Harris, J., in the same case, thought a still more accurate criterion would be to inquire whether the work and labor required in order to prepare the subject-matter of the contract for delivery was to be done for the vendor or for the vendee. If for the former, it would be a contract of sale; if for the latter, a contract of hiring.

§ 32. In *Lamb v. Crafts*,¹ the same court enunciated the doctrine of *Mixer v. Howarth*, namely, that if the article to be manufactured is such as is habitually being made, it is a contract of sale.

¹ 12 Met., 356 (1847).

This conclusion is said to have been deduced from some observations of Abbott, C. J., in *Garbutt v. Watson*; ¹ but an able writer on sales has declared that it does not rest upon any "satisfactory principle."²

Embarrassment was expressed by Mr. Justice Story in applying the rule. But, he says, that where the labor and service are the essential considerations, as in the case of the manufacture of a thing not *in esse*, the contract would not be within the statute; where the labor and service are only incidental to a subject *in esse*, the statute would apply.³

A similar rule was enunciated by Pollock, C. B., in *Clay v. Yates*,⁴ but it was rejected in *Lee v. Griffin*.⁵

The doctrine, however, seems to be recognized in some cases in New Hampshire and Wisconsin.

Pollock, C. B., says: "It seems *to me* the true rule is this: Whether the work and labor is of the essence of the contract, or whether it is the materials that are found; my impression is that in a case of a work of art, whether it be silver or gold, or marble or common plaster, that is a case of the application of labor of the highest description, and the materials is of no sort of importance compared with the labor, and, therefore, that all this would be recoverable as work and labor, and materials found. . . . I am rather inclined to think that it is only where the bargain is merely for goods thereafter to be made, and not where it is a mixed contract of work and labor, and materials found, that the act of Lord Tenterden applies."

§ 33. Notwithstanding the infinitely various shades of contracts, and the difficulty of disposing of the questions which arise in regard to them, there does not seem to be any considerable uncertainty in the rule of construction as followed in Massachusetts and some of the other states.

¹ 5 B. & A., 613.

² Benjamin on Sales, § 109.

³ Story on Sales, § 260; Low v. Andrews, 1 Story R., 38.

⁴ 1 Hurl. & N., 73 (1856); 25 L. J. Ex., 237.

⁵ 1 B. & S., 272. See, also, Benjamin on Sales, 106.

In the quite recent case of *Goddard v. Binney*,¹ Ames, J., said:

“A contract for the sale of articles then existing, or such as the vendor in the ordinary course of his business manufactures, or procures for the general market, whether on hand at the time or not, is a contract for the sale of goods to which the statute applies. But on the other hand, if the goods are to be manufactured especially for the purchaser, and upon his *special order*, and not for the general market, the case is not within the statute.”

The special subject of inquiry there seems to have been whether or not a *personal element* entered into the contract. The Massachusetts rule has been criticised as giving to the words “contract for the sale of goods,” etc., a meaning which the law makers could never have intended.

§ 34. In *The Sloan Saw Mill and Lumber Company v. Guttshall*,² touching the subject of sale and manufacture, the court, A. W. Stone, J., observes, that the distinction between contracts for an article to be entirely manufactured, and an article already existing, but to be fitted for delivery by the application of work and labor, “has received different constructions by the courts in this country and England.”

“In many recent authorities,” he says, “it has been held that when the purchase is of articles, such as the vendor regularly manufactures from time to time, and has for sale in the ordinary course of business, the contract is held to be within the statute; but if he manufactures *to order*, out of materials in his possession, it is not within the statute.”

The above opinion is quite in accord with the decisions of Wisconsin, New Jersey and Massachusetts, and some of the English cases.

§ 35. Take, also, the important case of *Gardner v. Joy*,³ which elicited a wide discussion.

¹ 115 Mass., 450; *Brown v. Allen*,

² 3 Col., 14.

³ 5 Iowa, 306; *Crockett v. Scribner*,

³ 9 Met. (50 Mass.), 179.

64 Me., 447; *Clark v. Nichols*, 107

Mass., 547.

There the contract was for the purchase of one thousand boxes of candles at a stated price, which the vendor agreed to manufacture and deliver in about three months from the date of the contract.

Shaw, C. J., decided this to be a contract of sale. He rested his judgment principally upon the ground that the goods bargained for were such as the vendor ordinarily manufactured for the market. He reiterated the doctrine which he had announced in a case nearly ten years before, to the effect that, if it is a contract to sell and deliver goods, whether they are then completed or not, it is within the statute of frauds. But if it is a contract to *make* and *deliver* an article, or quantity of goods, it is not within the statute.

§ 36. The case of *O'Neil v. New York and Silver Peak Mining Company*,¹ a Nevada case, also illustrates the principle as to what will constitute a contract of sale. The action was brought to recover the price of certain brick alleged to have been manufactured for the defendant. [An attachment was issued in the case, but that has no importance in this connection.] The manufacture of the brick was at a place, and out of clay selected by the defendant's agent. Beatty, C. J., truly observes that there has been considerable conflict of authority as to what particular contracts are to be deemed of sale and what of manufacture.

"For instance," he says, "if a miller, engaged regularly in the manufacture of flour, should contract to deliver the next hundred barrels of flour he may manufacture, it is rather difficult to determine whether such a contract is to be treated as a contract to *manufacture* one hundred barrels of flour, or a contract to *sell* one hundred barrels. Probably if the contract did not induce any change in the conduct of the miller, but he merely proceeded with his regular business, intending, under his contract, to deliver or sell the first product of his mill, this should be treated *as a sale*, because the manufacturer has not changed his condition, business or circumstances, on account of the contract."

¹ 3 Nev., 141.

This is substantially the doctrine of the English and Massachusetts decisions.

“But,” continues the learned chief justice, “if he had contracted to manufacture and deliver some peculiar article *out of the regular routine of his business*, for instance, a hundred barrels of kiln-dried corn meal, requiring the purchase of new material and the introduction of new appliances for the drying of the corn, this undoubtedly would, under all the decisions, be held a contract not merely for the sale but rather for the manufacture of the corn meal, and *not within the statute*. So, too, this contract to manufacture brick, not at a regular brick-yard of the plaintiff, but a spot selected by the defendant, was a contract not of sale but of manufacture.”

It appeared in the case that the plaintiff placed in the kiln more brick than would fill his contract; but the court declared that this fact made no difference.

The case not falling within the provisions of section 62 of the act in regard to conveyances, etc., the judgment of the court below was affirmed. Lewis, J., concurred in the conclusion as to the contract being one of manufacture and not of sale.

§ 37. An important case in New Jersey, as to what will constitute a sale of goods, within the operation of the statute of frauds, is *Finney v. Apgar*.¹ The action arose out of a contract for the sale of certain spokes, to be gotten out by the plaintiff, for the defendant, and to be delivered at a stated place. After they were delivered the defendant refused to accept them. The court decided, after an exhaustive examination of the cases, that a contract for the sale of goods which is purely executory is as much within the statute as is a contract to be executed *in presenti*. If the article does not exist *in solido* at the time of the contract, in effect, said the court, but is to be made upon a special order, and is an article distinguished from that of

¹ 31 N. J. Law, 271; 2 Vroom, 2 Zab., 196; *Mead v. Case*, 33 Barb., 266; but see *Parsons v. Woodward*, 202.

the ordinary business of the maker, such contract is, in substance and effect, for work and materials, and not within the statute of frauds.

It was suggested in a well-considered case,¹ that the first of the above rules is now received everywhere with entire judicial unanimity. With regard to the second rule, some conflict of opinion exists. But it is to be recommended by its evident consonance with the object of the statute, as well as by the decided weight of authority. In *Finney v. Apgar* the contract was held to be a sale, and within the statute of frauds.

§ 38. Again, take the case of *Prescott v. Locke*.² There a contract was made for *walnut spokes*, up to one hundred thousand, which the plaintiff agreed to saw and deliver at his mill, at the price of \$40 per thousand, in lots of ten thousand each, the defendant to have the right to select them at the plaintiff's mill. The court, evidently resting their decision upon the doctrine enunciated in *Pitkin v. Noyes*,³ and *Gilman v. Hill*,⁴ held that this was a contract of *sale*. That the contract when carried out would result in a sale of goods, and therefore the action could not be for work and labor as such. But it was held, following in the line of some of the English decisions, that if the *result* of the contract be that the party has done work which ends in nothing that can become the subject of sale, the party cannot maintain an action for goods sold and delivered.

And in *Cummings v. Dennett*,⁵ Whitman, J., said: "It is very clear that if application is made to a mechanic or manufacturer, for articles in his line of business, and he undertakes to prepare and finish them in a given time, such a contract, though not in writing, is not affected by the statute of frauds.

¹ *Meincke v. Falk*, 55 Wis., 427 (1882).

² 51 N. H., 94.

³ 48 N. H., 294.

⁴ 36 N. H., 311.

⁵ 26 Me., 401. See *Abbott v. Gilchrist*, 38 Me., 260; *Picket v. Swift*, 41 id., 68; *Edwards v. Grand Trunk R'y*, 48 id., 379; 2 *Parsons on Cont.*, 334 and note.

§ 39. The plaintiff, in *Meincke v. Falk*,¹ was a manufacturer of carriages. The defendant's intestate, through his agent, ordered a family carriage to be made at a price not to exceed \$900, and to be finished at a given time. The plaintiff made the carriage according to the order given. The intestate refused to accept it. It did not appear in the case whether the materials from which the carriage was made were then in stock in the plaintiff's factory, or were procured by him for the purpose. It was, however, proved that the intestate gave the order for the carriage according to a model selected by him; that in so doing he intended to have the carriage of the particular manufacture of the plaintiff; that his skill and workmanship were the special inducement for giving the order; and that otherwise the carriage would never have been made.

The particular make of carriage was not kept by the plaintiff for sale in his stock.

Judgment was rendered for the plaintiff; the defendant appealed.

The decision of the appellate court seems to be based upon *Goddard v. Binney*,² holding that the case was without the statute of frauds. Cassoday, J., said: "It may be well to observe that if we were to apply the rule adopted in New York of existence *in solido* or non-existence, as the only test, and if the facts were that the carriage in question was such as the plaintiff was then accustomed to manufacture and keep in stock for general sale, and that this carriage would have been manufactured by the plaintiff without any order from Falk, yet it would be without the statute, because it was not in existence *in solido* at the time of making the contract. But such assumed facts would bring the case within the statute, under the rule adopted in Massachusetts, since it is there in effect held that if in the ordinary course of business the article would have been manufactured or procured for the general market by the

¹ 55 Wis., 427; Alb. Law Jour., 510; 13 Nor. West Rep., 545. ² 115 Mass., 450.

vendor, in the absence of any special order or contract with the vendee, then it is a 'contract for the sale of' the article, and not a contract for skill, labor or workmanship in producing the article."

As is shown in another chapter, the early English decisions have held that the statute in no case extended to executory contracts of sale, but only to contracts which were capable of being executed immediately. But that doctrine was subsequently overruled in that country and disapproved in Massachusetts, New Jersey, Maine, and some of the New York cases. But it was so far adopted in some of the other New York cases, says the court, as to hold that if the thing contracted for is not in existence at the time, then it cannot come within the statute, notwithstanding it may, in the language of the act, be a "contract for the sale" of the article, and in no sense a contract for skill, labor or workmanship.

"We are inclined to think," continues the learned judge, "that the rule announced by Chief Justice Shaw, in *Mixer v. Howarth*,¹ and followed in *Goddard v. Binney*,² supported as it is by the New Jersey, Maine, and some of the New York cases, is in substantial harmony with the rule as finally settled in England prior to their recent statute; and hence is entitled to our confidence and respect. We therefore hold that, while an executory contract for the sale of an article for the price of \$50 or more may be within the statute, notwithstanding such article does not at the time exist *in solido*, yet where such contract is to furnish materials and manufacture the article *according to specifications furnished* or a model selected, and when without the special contract the thing would never have been manufactured in the particular manner, shape, or condition it was, *then the contract is essentially for special skill, labor, or workmanship, and is not within the statute.*"

§ 40. It has been held in New Hampshire and some other states that if the contract is for an article coming under the

¹ 21 Pick., 207.

² 115 Mass., 450.

denomination of goods, etc., the quantity and price being agreed upon, it is a contract of *sale*, notwithstanding the subject-matter does not exist at the time, but is to be converted into goods afterward by the vendor. But, if what is contemplated by the contract is the peculiar skill and labor of the maker, and these elements enter into the essence of the contract, it is *without* the statute of frauds. Thus, in *Pitkin v. Noyes*,¹ where the defendant agreed to raise three acres of potatoes and deliver them to the plaintiff at a certain price per bushel, Bellows, J., said: "If a person contracts to manufacture and deliver at a future time certain goods, at prices then fixed, or *at reasonable prices*, the essence of the agreement being that he will bestow his own labor and skill upon the manufacture, it is held not to be within the statute. If, on the other hand, the bargain be to deliver goods of a *certain description* at a future time, and they are not existing at the time of the contract, *but the seller does not stipulate to manufacture them himself, or procure a particular person to do so, the contract is within the statute.*"

In the one case the buyer has the right to require him to do it, and cannot be compelled to take one as good, or even better, if made by another; while in the other case the seller only agrees to sell and deliver the article, and is under no obligation to make it himself, but may purchase it of another.

In substance, he further said, that if the contract be substantially for the goods it is within the statute whether they are then manufactured or not; but it is otherwise if the contract be to manufacture and deliver the goods, that is, if the labor and skill of the seller are stipulated for, and make part of the contract.

It is quite obvious that the labor and skill of a workman may be bargained for in this way as well as in any other,

¹48 N. H., 294. See, also, *Hight* enunciated in *Hight v. Ripley, v. Ripley*, 19 Me., 137; *Picket v. supra*, is recognized as sound by *Swift*, 41 id., 68. The doctrine as *Parsons on Contracts*, 2d vol., 334.

his compensation being in the price of the article he makes; and "the only question in this particular case is whether the skill and labor of that workman were especially contracted for, so that the employer was entitled to that, and could be obliged to take no other.

"In many cases, then, there could be no difficulty in determining whether the labor and skill of the particular person were of the essence of the contract, or whether they were, in the contemplation of the parties, substantially a sale."

§ 41. But in *Atwater v. Hough*,¹ which case arose out of a contract to deliver one hundred sewing machines, of a particular make, at a specified time and place, and that a part of them not then completed should be finished within the time agreed, by a person who worked in the vendor's shop, and with his materials, was held to be a contract of *sale* and not for the *manufacture* of the machines.

The court holding that even if it were otherwise as to the part not finished, sixty-four in number, yet, as the contract was entire, and as it was clear that in respect to the thirty-six machines which were completed it was a sale, the whole must be regarded as within the statute of frauds.

In *Partridge v. Wilsey*,² where the plaintiffs, doing business in New York, and the contract was that the goods were to be shipped by them immediately, to the defendant at Keokuk, Iowa, by express, and that money and labor must necessarily be expended in procuring them, *held* not sufficient to take the case out of the statute of frauds.

§ 42. It has, in effect, been well said by an accurate writer, that the American courts appear to have groped steadily along by the light of the English precedents, some halting by the way, others passing on. The fact that the decisions are quite irreconcilable has resulted mainly from this fact: that the courts, in the earlier history of the statute of frauds, sought to circumscribe its meaning and to

¹ 29 Conn. R., 508. See, also, *Allen Garbutt v. Watson*, 5 Barn. & Ald., v. Jarvis, 20 id., 38; *Eichelberger* 613.
v. McCauley, 5 H. & John., 213; ² 8 Iowa, 461.

give it a strict construction. The words "no contract for the sale of" seem to admit of at least the following interpretations:

If the articles bargained for do not exist *in specie*, but are to be manufactured, there is no contract of sale, on the theory that there is no sale, strictly speaking, within the intent of the statute of frauds until the parties to the contract are *ad idem* upon an existing subject-matter. If the contract be for goods existing, or goods not existing, but which in effect is for goods to be sold and delivered, and not for work, labor and materials, and which when completed will result in the sale of goods or chattels for a price, it constitutes a contract of sale.

Midway between these extremes, says Mr. Schouler in his admirable work on personal property, stands the Massachusetts rule, which, while admitting discrepancies, brings more of the earlier and later cases into good fellowship than any other yet put forward; but the objection is that it distorts the legislative expression.¹

¹ Schouler on Per. Prop., 442.

CHAPTER III.

OF CONTRACTS WITHIN THE STATUTE OF FRAUDS—RULE OF CONSTRUCTION OF CONTRACTS IN NEW YORK AND SOME OTHER STATES.

- § 43. What contracts deemed not to be of sale.
- 44. What contracts are deemed of sale.
- 45. An illustration of the New York rule; the case of *Downs v. Ross*.
- 46. The same subject continued.
- 47. Another illustration; *Cooke v. Millard*.
- 48. The same subject continued.
- 49. A distinction on the same subject.
- 50. Distinction between a sale and a manufacture.
- 51. A sale; subject-matter to be in substantial existence.
- 52. Rule adopted in the *Passaic Manufacturing Company v. Hoffman*.
- 53. The same subject continued.
- 54. Manufacture or sale; a close case; *Mead v. Case*.
- 55. The same subject continued; a dissenting opinion by Smith, J.
- 56. The same subject continued.
- 57. The same subject; a Canada case.
- 58. Contract where part of goods delivered and paid for.
- 58a. The same subject continued.
- 59. Where goods sold are not in existence.
- 60. A sale where goods are partly in existence.
- 61. Another illustration; *Fitzsimmons v. Woodruff*.
- 62. Simple contract to deliver invalid.
- 63. A contract which must be in writing cannot be modified by
parol.
- 64. Contract for goods *in solido* not converted into a contract for
work and labor by vendor doing work on the goods.
- 65. Distinction drawn between different kinds of contracts.
- 66. The same subject continued.
- 67. The case of *Bird v. Muhlenberg*.
- 68. Another illustration on kinds of contracts.
- 69. Reference to several cases on the same general subject.
- 70. The case of *Pawelski v. Hargreaves*; a good illustration and a
safe rule.
- 71. It is the province of the jury to determine as to performance of a
contract.

§ 43. The essentials of contracts affected by the statute of frauds, and the interpretation such contracts have received in Massachusetts and some other states, have already been shown. A construction different from either of those mentioned is followed by the decisions of New York and some of the other states.

The rule may be stated as follows: If the subject-matter of the contract be not in existence at the time the contract is made, but has to be manufactured, for example, flour from wheat not yet ground; or nails to be made from iron to be supplied by the manufacturer; or paper to be manufactured from rags to be supplied by the vendor,—in all such cases the contract is held to be not one of sale.

In other words, the subject-matter contracted for must be in substantial existence at the time the contract is made.¹

§ 44. The weight of the more recent authorities is that, if the articles are in existence at the time of the contract, notwithstanding they may have been ordered of a vendor who is to do certain work upon them to suit the wants of the vendee, it is a sale.

It was declared by an able jurist, in an important case, that there ought to be but the single distinction, and that between existing and non-existing chattels. But under such a rule there would still arise what may be termed “border cases,” where it would be difficult, if not quite impossible, to draw the line of distinction.

In a word, the rule is recognized between a contract for the sale and delivery immediately, or at a future day, of an article then existing, and a contract to sell and deliver an article not then manufactured, but to be made afterward. A contract of the former class is within the statute of frauds; the latter is not.

§ 45. Although the case of *Downs v. Ross*² falls very near the line, it is a good illustration of the New York rule.

¹ Cases illustrative of these rules *Millard*, 5 Lans. (N. Y.), 246; *aff'd*, are *Parsons v. Loucks*, 48 N. Y., 19; 65 N. Y., 352.
Sewall v. Fitch, 8 Cow., 215; *Parker* ² 23 Wend. (N. Y.), 270, *Monell*,
v. Schenck, 28 Barb., 38; *Cooke v. J.* (1840).

The decision was a step in advance of all previous cases. There, the plaintiff's authorized agent, August 30, 1836, contracted verbally with the defendant, at Elmira, for the purchase of certain wheat. The defendant had about two hundred and fifty bushels then in his granary, and was threshing more. The bargain was for about seven hundred bushels, at ten shillings a bushel, which the defendant agreed to deliver September 5th, at Westlake's Basin, on the Chemung Canal feeder. The wheat was to be paid for on delivery. The threshed wheat in the granary, which comprised a part of the wheat under the contract, was not well cleaned, and the defendant agreed further to clean it.

There was no writing, no money paid, nor any wheat delivered at the time of the making of the contract.

On the day for its delivery, wheat having advanced in price, the defendant refused to fulfil his contract.

This action was brought to recover damages resulting therefrom. In the court below, the defendant claimed that the contract, in whole or in part, was within the statute of frauds, and therefore void, and moved for a nonsuit. This was denied.

§ 46. There was conflicting evidence as to the terms of the contract, and also as to misrepresentations on the part of the plaintiff's agent.

The trial judge charged the jury that the contract was not within the statute of frauds; that it was a contract for work and labor.

A new trial was granted. On appeal Bronson, J., observes: "It is said that this was, either in whole or in part, a contract for work and labor, and so not within the statute. But I think it was neither more nor less than a contract of sale; and if we are not tied down by the commentaries with which the statute of frauds has been so heavily overlaid, the agreement must be declared void.

"It is not to be denied that a pretty large license was formerly taken in the construction of statutes. Refined and artificial distinctions were sometimes sanctioned for

the purpose of taking cases out of the operation of legislative enactments, and a broad foundation was thus laid for the vast amount of legal controversy which has followed."

He thought that the statute never would be "explained," if it should be held that a promise by the seller to thresh his grain, or to blow the chaff out of a bin of wheat before sending it to market, changes the contract of sale into an agreement for work and labor. "Whatever may be the bearing of the earlier cases," he observed, "the more recent decisions will not lead us into any such absurdity. If the thing sold exist at the time *in solido*, the mere fact that the seller is to do something to it to put it in a marketable condition will not take the contract out of the operation of the statute of frauds."

After referring with approval to the decisions in *Garbutt v. Watson*,¹ *Astey v. Emery*,² *Watts v. Friend*,³ and *Smith v. Surman*,⁴ the justice observed that these cases show that the English courts "have got back again on the firm foundation of reason and common sense."

In this opinion Nelson, J., concurred.

Cowen, J., dissented. He thought that, as none of the wheat was in a condition for transportation and delivery, as the statute of frauds respects a sale, and as by the cases it meant a sale unmixed with a contract of labor in preparing the article for delivery, the contract was without the statute. It may be said that nowhere have the two theories been more tersely and distinctly stated than in the above opinions.

The distinction drawn by Cowen, J., is considered too refined. Clearly the work to be done upon the wheat was for the purpose of putting it in a condition for delivery, and was done for the vendor himself, and not as employee of the vendee. This was an important element in the case.

¹ 1 Dowl. & R., 219.

² 4 Maule & S., 262.

³ 12 B. & C., 446.

⁴ 9 B. & C., 561.

§ 47. The judgment in *Cooke v. Millard*¹ is also a good illustration of the rule. There, as already indicated, a verbal contract was made for the purchase of specified kinds of lumber, at stated prices, amounting in the aggregate to over \$900. The lumber was in substantial existence, but had to be dressed, rabbetted and cut to answer the order.

No memorandum in writing of the bargain was subscribed. At the time of the contract the defendants told the plaintiffs to notify one Percival when the lumber was ready for shipment and he would take it away. In about ten days the lumber was prepared according to the order, and was placed on the plaintiffs' dock; Percival was notified, but he did not ship the lumber, and next morning it was destroyed by fire.

The referee found the contract to be void under the statute. The general term affirmed the judgment. On appeal, two principal questions were discussed: First, whether the contract was within the statute of frauds; and, secondly, whether the acts done by the parties were sufficient to comply with the terms of the contract so as to render the contract enforceable by law.

§ 48. The court seem to have followed the case of *Crookshank v. Burrell*,² and *Downs v. Ross*,³ and held that to bring a case within the operation of the statute of frauds it must be a contract for a thing existing *in solido*. The judgment in favor of the defendants was affirmed.

The distinction, in general, is made between a sale of goods in existence at the time of making the contract, and an agreement to manufacture goods. The former is held to be within the prohibition of the statute, and void unless it is in writing, or there has been a delivery of a portion of the goods sold, or a payment of the purchase price. The latter is not.

¹ 65 N. Y. R., 352; 5 Lans. S. C., v. Zeilly, 52 Barb., 482; *Stephens v.* 243 (1871), general term third department, Parker, J. See Webster

² 18 Johns., 58.

³ 23 Wend., 271

The rule advanced in *Cooke v. Millard*, that the test ought to be between existing and non-existing articles, has, by some of the cases, been criticised as unsound.¹ If it were possible to adhere to such a rule it would doubtless relieve the courts of much embarrassment; but obviously, the difficulty is that in "border cases" it would be quite impossible to adequately apply such a rule.

§ 49. Dwight, C., in an able and luminous opinion, commends the philosophical and readily understood rule laid down in *Lee v. Griffin*,² and expresses surprise that it should have been first enunciated at so late a stage in the discussion of the statute; but concedes that it is too late to adopt it in full in New York. "So far as authoritative decisions have gone," he says, "they must be respected, even at the expense of sound principle. The court, however, in view of the present state of the law, should plant itself, so far as it is not precluded from doing so by authority, upon some clearly intelligible ground, and introduce no more nice and perplexing distinctions."

He declared the rule to be that, "when the chattel is in existence, so as not to be governed by *Parsons v. Loucks*,³ the contract should be deemed one of sale, even though it may have been ordered from a seller who is to do some work upon it to adapt it to the wants of the purchaser. Such a rule makes but a single distinction, and that is between existing and non-existing chattels."

That the contract in *Cooke v. Millard* was one of sale under the New York decisions is sustained by *Smith v. New York Central Railroad Company*,⁴ and cases cited.

§ 50. The distinction between a sale and a manufacture was lucidly drawn by Park, J., at the general term.⁵ He

¹ *Goddard v. Binney*, 115 Mass., 454; *Pitkin v. Noyes*, 48 N. H., 297; *Meinke v. Falk*, 55 Wis., 427.

² 1 Best & S., 272; 30 L. J. Q. B., 252.

³ 48 N. Y., 17.

⁴ *Keys*, 180 (1868). In *Gilman*

v. Hill, 36 N. H. R., 311, it was held that a contract for sheep pelts to be taken from sheep was a contract for things in existence and a sale.

⁵ *Cooke v. Millard*, 5 Lans. (N. Y.), 246.

says, in effect, that the work to be done in *Cooke v. Millard*, upon the subject of the action, was work which the plaintiffs were to do for themselves. The defendants agreed for the lumber in such a condition, and though it was to be lumber from certain piles in the plaintiffs' yard, yet it was no less a purchasing of lumber, and not a hiring of the plaintiffs to manufacture it. "There is a marked distinction," says the court, "between such a transaction and an agreement for the manufacture of an article. This was not a manufacture of lumber. That existed *in solido*, and what was to be done was to put it into marketable condition. It was, part of it, in the rough, and this was to be planed and matched. It was not of the desired size and was to be slit." In this regard it was similar to unthreshed wheat; a sale of wheat by parol, with an agreement that it should be threshed by the vendors, which was held to be *within the statute*.

§ 51. A contract for the sale of a commodity not in existence at the time of the making of the contract, but which the vendor is entirely to manufacture and deliver, is not a contract of sale under the well-established decisions of New York. They lay particular stress upon the statutory word "sale." The subject-matter of the contract must be in substantial existence at the time the contract is made. *Parsons v. Loucks*¹ is a decisive expression of the prevailing doctrine. There the contract was for the manufacture of a large quantity of book paper. The court not only held it to be a contract for work and labor, but also that the word *sale* in the statute refers to the time of entering into the contract.

On the other hand, as elsewhere shown, the English cases make particular reference to the time of delivery of the goods or chattels as contemplated by the parties to the contract, as also do the cases in Massachusetts and some other states.

¹ 48 N. Y., 19 (1871); *Shepherd v. Pressey*, 32 N. H., 57.

§ 52. Another good illustration of the law as to what may be deemed a manufacture and what a sale is the case of the Passaic Manufacturing Company *v.* Hoffman,¹ wherein Mr. Chief Judge Daly delivered an elaborate opinion.

The plaintiffs were manufacturers of "warps." The defendants manufactured "market nets," and in their fabrication warps were used.

In March, 1867, the defendants wrote to the plaintiffs that they might fill an order for warps, and repeated orders for them, if they could do so on the same terms they had supplied the defendants in previous years, that is, at the lowest market price; and that they would pay for all warps bought in one month at the end of the following month. The plaintiffs answered that they would make one hundred warps for them "at seventy cents per pound upon the terms proposed." The defendants replied, saying they did not know their immediate wants, but that "meantime we wish you to accept an order for fifty warps instead of one hundred at the price of seventy cents, and if cotton (the moment this order is filled) is no lower you will have our order for the fifty more." The plaintiffs, by letter, accepted the order for the fifty warps at seventy cents, and agreed to deliver fifty more, if cotton was no higher nor lower, at the expiration of the delivery of the first fifty. The court held that this was a sufficient notice of acceptance on the part of the plaintiffs of the order for fifty warps.²

Twelve of the fifty warps were delivered during March and April, and paid for. The remaining thirty-eight warps were finished, and the plaintiffs requested the defendants to receive them, but they would not. The plaintiffs then wrote

¹ 13 Daly R. (N. Y.), 495; 11 Am. Law Reg. (N. S.), 119. Dwight, C., in *Cooke v. Millard*, 65 N. Y., 363, criticises the soundness of the distinction drawn by the court in that case.

² See *Vassar v. Camp*, 11 N. Y. R., 441; *O'Neill v. James*, 43 N. Y., 84; *Phillips v. Moore*, 71 Me., 78; *Mattison v. Schofield*, 27 Wis., 671; *Mactier v. Frith*, 6 Wend., 106.

to the defendants that the said warps had been finished some time, and they would send them to their factory *on a specified day if requested*. The defendants replied: "We beg leave to say that we accept *no warps* which you have made without order and contrary to any statement of ours. When we want warps we order them or send for them, and when we don't order them, and when the *price of cotton* upon which any order was based as a price is so much lowered, *the case is altered*, and, too, the manufacture of nets for the present has long since ceased with us. Warps concerning which you are so anxious to sell were not made for us any more than for any other manufacturer, and we have authorized no manufacturer to pile up warps for us, but that as we wanted them we would order."

The plaintiffs made several attempts to deliver the warps, but without success. The ruling price of warps was then about sixty-three cents instead of seventy cents per pound.

A few weeks afterwards, the plaintiffs wrote the defendants that they had sent the thirty-eight warps to an auctioneer to be sold at auction, stating the place and time of sale, and they would hold them responsible for the difference between the contract price and the price they might bring. The sale was advertised in the regular way. The warps were sold accordingly, and realized \$446.61 less than the contract price; the plaintiffs recovered judgment for that amount.

§ 53. On the trial below, the president of the plaintiffs' company testified that he did not know whether they had any warps on hand when the first letter was received from the defendants, nor could he tell how many they had on hand during the subsequent correspondence; that they were manufacturing similar warps for other parties, and were manufacturing this class of goods all the while; he could not say that they were ready all the time to deliver the whole of them, but when a demand was made they were ready to fill the order; that the cotton was not bought for the defendants nor the yarn in the spool made for them

particularly; that they were in the habit of *manufacturing* this kind of warp for them, but seldom kept them on hand; that they were not a standard article, nor was there a market price for such warps at the time of the sale.

Daly, C. J., says: "I think this must be regarded as an agreement between the plaintiffs and the defendants *for the manufacture of fifty warps*, and that it was *not* a contract of sale within the meaning of the statute. It has several distinguishing features. In the first place, the article is one of a peculiar kind. In the next place, the number contracted for was to be produced and delivered as the defendants wanted them. In the third place, it is a fair presumption from the evidence that they were all manufactured after the order for them was accepted. . . . In the fourth place, the evidence warrants the conclusion that the agreement contemplated that the warps were to be of the plaintiffs' manufacture. This, I think, is indicated sufficiently by a passage in the very letter in which the order is given by the defendants for the fifty warps and the promise held out of a further order for fifty more, viz.: "Finding your warps *uniform*, we shall be faithful to you." This brings the case within the distinction relied upon in *Hight v. Ripley*,¹ that it is the labor and skill of the person to whom the order is given, combined with the material that is contracted for and to which the other party is entitled; and distinguishes it from *Gardner v. Joy*,² in which, to quote from the work of Mr. Browne,³ it was clearly no part of the bargain that the vendor should manufacture the candles. The judgment in favor of the plaintiffs was affirmed.

§ 54. Although, when the subject-matter is in substantial existence at the time of the contract, but something is agreed to be done to the article by the vendor to put it in condition for use or to render it marketable, the contract generally is held to be a contract of *sale*, and void under the statute unless there is a memorandum in writing, there is

¹ 19 Maine, 137.

² 9 Metc. (Mass.), 179.

³ Browne on Statute of Frauds, sec. 308, 3d ed.

one case, however, holding a contrary doctrine. Thus, in *Mead v. Case*,¹ where a verbal contract was made for a marble monument then complete in its general form, but which was required to be *lettered, polished, finished and set up* at an agreed price, it was held to be a contract *for work, labor and materials*, and valid without any writing. In effect it was declared to be a contract to *manufacture a monument not then in existence*.

"A monument," says Johnson, J., in that case, "is something designed and constructed to perpetuate the memory of some particular person or event. Before the material was polished and the inscriptions engraved upon it, it was a *mere structure of stone, blank and meaningless*." In other words, the defendant bargained for "the necessary labor and skill to convert this stone into an enduring memorial of the dead."

It was not converted into "an article of general merchandise."

"It was as much *converted, or manufactured*, into a *monument* after it was thus fashioned and put together, as a garment is made, or manufactured, from cloth previously manufactured from wool or other raw material; or a sign, by painting, or engraving the necessary inscriptions or devices upon wood, metal or other material previously prepared in that form; or statuary by the delicate and skilful chiseling of the creative artist, after the marble has been wrought into the general form by ruder labor; the process in each case and degree of alteration being somewhat different." The judgment in favor of the plaintiff was affirmed.

§ 55. E. Darwin Smith, J., dissented. He thought the test to be applied in this, as in every case, should be, *is the contract for the sale of goods?* "Here," he says, "was a case of the *sale* of a specific article in existence *in solido, seen and inspected and capable of immediate delivery*."

¹33 Barb., 202.

Although "some additional work" was to be done upon the *monument*, he considered the contract one of *bargain and sale*. The work was included in the purchase price fixed at the time, and "all the evidence tends to show that the contract was for the *sale of a monument*." He could not appreciate the view taken by the court, that the pieces of marble composing the monument in question did not constitute a monument while the same were in the plaintiff's yard and shop, unfinished, and could only be fitly called *a monument when put up in memorial of the dead*. The motion for nonsuit, he thought, should have been granted.

§ 56. The decision in *Mead v. Case*, *supra*, as has been shown, was by a divided court. The policy of the decision has been somewhat criticised. The learned justice in *Cooke v. Millard*,¹ however, thought it "unnecessary to quarrel" with the case, for if unsound, it was only a case of a misapplication of an established rule; and if sound, it was a so-called *border case*, showing the refinements which are likely to arise in applying to various transactions the rule adopted in *Sewall v. Fitch*,² and kindred cases.

He thought the notion that such an arrangement of marble placed in a cemetery over a grave cannot be regarded as a *monument*, in the absence of an inscription, *seems highly strained*. "Then," he says, "there could not be a memorial church without an inscription." Then, also, it may be observed, that it could not have been said of Sir Christopher Wren, in his relation to one of his great architectural productions, *si quæris monumentum, circumspice*. "It would seem to be enough," says the court further, "if the monument reminds the passer-by of him whom it is intended to commemorate, and this might be by tradition, inscriptions on adjoining or neighboring objects, or otherwise."

Clearly the case seems to fall very near the line. But *quære*: As the monument, *with the inscription upon it*, could only be of value to him or to those who desired it, may it

¹ 65 N. Y., 352.

² 8 Cowen, 215.

not be reasonably considered as an article made upon a *special order* and not marketable, and therefore fairly without the statute of frauds, under the decisions?

§ 57. There is another case, quite analogous to that of *Mead v. Case*,¹ but decided the other way. It appeared in *Wolfenden v. Wilson*,² that Margaret Ann Wilson, when she was ill, and about three months before she died, ordered from the plaintiffs a tombstone, to be put up at the grave of her first husband. The base of the monument seems to have been set up before her death, but the tombstone was not put up until after her death. It did not appear how far the work had advanced at the time of Mrs. Wilson's death, nor that she knew that any portion of it had been delivered; nor did it appear what kind of a monument it was.

Richards, C. J., said: "We may safely conclude that the sale when carried out would have been the sale of a chattel, and could have been sued for as goods sold and delivered. The plaintiffs seem so to have considered it, for it is for that they have sued." And he continues: "The fact that the seller may have agreed to place it in a particular graveyard, or particular part of a cemetery, would not make it any the less a chattel." And further the court instances that the sale of a pump or the sale of a steam-engine would be the sale of a chattel, though the seller had agreed to place it in position, or fit it up, as the case might be.

After citing several leading English authorities, the court concludes that a nonsuit would be proper.

§ 58. In *Ferren v. O'Hara*,³ as appears by the facts in the case, a parol contract was made in March, by which the plaintiff agreed to sell to the defendant all the malt which he then had, and which he should make up to November following, at ninety-three and one-half cents per bushel. A certain part of the malt was received and paid for down to

¹ 33 Barb., 202.

² 33 U. C. B., 442

³ 62 Barb., 517. The case of *Don-*

ovan v. Willson, 26 Barb., 138, is on all fours with this case and decisive of it.

July, when the price of the article having declined, the defendant refused to receive any more.

The plaintiff then had on hand such a quantity of malt as that the difference between the contract price and the then ruling market price, would, if sold, occasion a loss of \$369.48.

The plaintiff brought his action to recover this amount.

In the court below the plaintiff was nonsuited; first, on the ground that the contract was without consideration; and second, that the contract was void under the statute of frauds.

§ 58*a*. In his decision, Mullen, J., after referring to several cases in England and in this country, confesses that if he were at liberty to follow what he considered the true rule on the subject, he would yield to the reasoning in *Hight v. Ripley*,¹ as to the difference between a contract to manufacture and a contract of sale.

Referring to *Donovan v. Willson*,² where the agreement was for beer thereafter to be made, where it was held not to be within the statute of frauds, he says: "I can perceive no distinction in principle whether the subject-matter of the contract is *malt* or *beer*; in each the material must be purchased. In each the raw material is transformed by labor and chemical changes into something different from itself. And I feel constrained to yield to this, although, as I have already remarked, I entertain great doubts whether the construction which takes these cases out of the statute is correct."

It was made in the ordinary business of the seller. No particular skill or workmanship was to be exercised in its manufacture.

¹ 19 Me., 137.

² 26 Barb., 138. Contrast the above cited cases with *Bronson v. Wiman*, 10 Barb. S. C. R., 406, where a contract was made to deliver two thousand barrels of flour,

to be ground out of wheat which had been bargained for but not yet received, and it was held to be for work and labor, and not within the statute.

§ 59. *Crockett v. Scribner*¹ was an action in *assumpsit* upon a parol contract for the manufacture of staves.

The staves were not in existence when the contract was made, but were to be manufactured from a particular lot of timber. This fact led the court to conclude that the contract was for the *manufacture* and delivery of the staves, and was not, therefore, within the statute of frauds. "The law," said Dickenson, J., "is well settled that such a contract is not within the statute of frauds."

§ 60. The plaintiff, in *Flint v. Corbitt*,² was a manufacturer of and dealer in furniture. He had his factory in one part of the city and his warehouse in another, where his goods were sold. Furniture made in the factory was finished in the warehouse. At the plaintiff's warehouse the defendant selected several pieces of furniture, then only in part covered, and directed that they be covered with *brocattelle* of a certain kind and quality. Nothing remained to be done by the plaintiff but to cover and varnish the several pieces of furniture as directed.

After the furniture was thus finished it was sent to the defendant at his house, but he refused to receive it. This action was brought to recover the purchase price. On appeal it was decided that the contract was of *sale*. The court say: "When the contract is for the purchase of an article which the vendor usually has for sale in the course of his business, which he keeps in his warehouse *substantially made*, but not entirely finished, that the taste or wish of the purchaser may be consulted as to the final finish, *the finishing of it in the manner the purchaser desires, does not change it from a contract of sale into a contract for work and labor*."

¹ 64 Maine, 447; *Abbott v. Gilchrist*, 38 id., 260; *Goddard v. Binney*, 115 Mass., 450.

² 6 Daly's R., 429; *Phipps v. McFarlane*, 3 Minn., 109; *Rentch v. Long*, 27 Md., 188; *Seymour v.*

Davis, 2 Sandf., 239; *O'Neil v. N. Y. and Silver Peak Mining Co.*, 3 Nev., 141; *Kellogg v. Witherhead*, 4 Hun, 273; *Smith v. N. Y. Cent. R. R.*, 4 Keys, 180; *Deal v. Maxwell*, 51 N. Y., 652.

“What is in contemplation of the parties is the purchase and sale of an article which is examined and selected, but upon which something more is to be done, which, as a matter of taste, choice or expense is left to the purchaser.”

The furniture, after being covered as ordered, was still *a subject of sale*. The contract was *void* in default of a memorandum of the bargain subscribed by the defendant, and judgment was given for the defendant. Clearly the facts in the above case admit of a different rule of construction from the facts in *Mead v. Case*.¹

§ 61. *Fitzsimons v. Woodruff*² was an action for goods sold and delivered, and labor performed in the construction of a marble mantel at an agreed price. It was essentially a verbal contract.

The mantel was taken to the defendant's house and put up where it belonged by the workmen of the plaintiff and defendant. The referee found, that after it was connected with the chimney the defendant claimed that it was not according to contract; that a silver bar was to have been furnished. The defendant requested the plaintiff's workman to inform the plaintiff that there was none, which he promised to do. The work was then continued; the defendant also complained that one of the “wall-pieces was too short,” and said he would not accept the mantel. The workman informed him that the wall-piece was right, but the floor was uneven. The work was proceeded with without further objection, the defendant being present until within fifteen minutes before it was finished. The contract did not require the plaintiff to furnish a silver bar, and the wall-pieces were not uneven as shown by the testimony.

The referee, however, found that the contract was invalid. The appellate court held that he erred, and decided that there was such an acceptance of the mantel as rendered the contract valid. That the contract was of *sale*, which would become complete upon a delivery to and an

¹ 33 Barb., 202.

² 74 N. Y., 621.

acceptance by the defendant, although, as it appeared, the plaintiff was to do more work upon it, and adapt it to the wants of the defendant.

§ 62. A simple oral agreement to deliver at a specified time and place, no part of the goods delivered or price paid, is void by the statute of frauds.

In *Nichols v. Mitchell*,¹ an agreement of the above character, to deliver wheat, was held by Lyon, J., to be like the original contract in *Hooker v. Knab*.² He says: "Had the defendant delivered the wheat, or perhaps some portion of it, pursuant to the contract, or had he paid the differences when ascertained, these acts would have been an execution, or at least a part execution, of the contract, but nothing less than this would so operate."

In *Nichols v. Mitchell*, *supra*, a promissory note was given for the difference between the contract price of the wheat and the increased market value thereof, when delivery was due by the terms of the contract, and it was held to be void for want of consideration.

§ 63. Where A., in writing, agreed to purchase of B. the flax straw to be raised from forty-five bushels of flax-seed, and to be "delivered in a dry condition, free from grass, weeds and all foreign substances;" the price being agreed upon; and the amount of straw agreed to be delivered came within the words of the statute of frauds, "for the price of fifty dollars," the court held that it was essentially a contract of sale, and not for work, labor or skill in producing the straw. Hence, as no part of the price was paid, nor any part of the straw accepted or received by the vendee, the contract was void.

In *Brown v. Sanborn*,³ which case is the basis for the above statement and conclusion, it was claimed that the defendant, by parol, agreed to a modification of the contract by waiving the condition that the straw should be free

¹ 30 Wis., 329.

² 26 Wis., 511.

³ 21 Minn., 402. See, also, *Nichols*

v. Allen, 23 id., 542; *Drefolt v. Gorman*, 1 id., 301.

from weeds, and agreeing to receive the straw notwithstanding its weedy condition. This evidence was admitted at the trial.

The court, Berry, J., says: "As the effect of admitting the evidence was to allow the plaintiff to prove, by parol, a contract which, to be valid, must be in writing, its admission was erroneous, and entitled the defendant to the new trial granted by the court below."

The order granting a new trial was affirmed.

§ 64. In *Hardell v. McClure*¹ certain wheat was to be delivered at a particular mill, and the trial court refused to instruct the jury that "the wheat existing *in solido* at the time the contract was made, and not having to be raised or manufactured, and though unthreshed, it was a contract within the statute of frauds, and the plaintiff could not recover," and for that refusal the judgment was reversed.

In *Meinke v. Falk*² the court approves the above decision, and also the decision in *Downs v. Ross*.³ After a very careful examination of the authorities, Cassoday, J., was induced to believe that *Hardell v. McClure*, *supra*, was well decided not only by force of reason, but upon the weight of authority, for it was clearly not a contract for special labor in manufacturing anything, but a contract to sell and deliver a certain quantity of wheat. And the mere fact that the wheat was to be cleaned by the vendor before delivery did not convert the contract from one of sale into one for work and labor. The current authorities hold in all such cases that it is a *sale*, pure and simple, within the operation of the statute.⁴

§ 65. In further illustration of what contracts are within the statute, take the case of *Cason v. Cheely*.⁵ There the contract was for the whole of the crop of cotton for the

¹ 2 Pin., 289; S. C., 1 Chand., 271.

² 55 Wis. R., 427.

³ 23 Wend., 271.

⁴ *Clark v. Nichols*, 107 Mass., 547.

Thus, where an agreement was made to purchase hams which the

seller was in the act of smoking, it was held to be a sale. *Kellogg v. Witherhead*, 6 Supm. (T. & C.), 525; Mem., S. C., 4 Hun, 273.

⁵ 6 Ga. R., 554 (1849).

year 1846, to be delivered, at seven cents per pound, as soon as it could be gathered and prepared for market. The court held this to be a contract of sale, and not of work and labor; for, observed the learned justice, the work and labor would have been bestowed in the production of the article if the contract had not been made; and he distinguished it from the making or production of an article unsuited to the general market, and the manufacture of goods, wherein the manufacturer does not necessarily lose the result of his labor, for the reason that if the purchaser does not take the goods others will.

The contract in question was entered into in September, after the crop was planted. The statute of frauds of Georgia is in effect the same as the English statute.

In that case, Nesbit, J., confessed to some difficulty in fixing a rule by which it may be determined what contracts are for the sale of goods, and what contracts are for work and labor done. There are two classes of cases which are easily determined: Where the article exists at the time *in solido*, and is capable of immediate delivery, as cotton or flour in bags, the contract is clearly within the statute of frauds, as shown in *Cooper v. Elston*.¹ All such contracts are within the statute.

§ 66. The other class of contracts, which are equally free from difficulty, are like that in *Towers v. Osborne*,² where an agreement was made for goods not *in esse*; and when made, may be reasonably presumed to be unsuited to the general market. Such as contracts for the manufacture of goods suited alone to a particular market; or *for the painting of one's own portrait*.

"In the former class, the contracts are for the sale of goods upon which no work or labor is to be bestowed. In the latter class, the work and labor and materials constitute the prime consideration. They are for work and labor, and are, by authority and upon principle, without the influence of the statute. *Ex equo et bono*, a man who agrees to be-

¹ 7 Term R., 14.

² 1 Str., 506.

stow his labor in the manufacture of goods for a price, and which price he must lose unless the goods are received by him who ordered them, ought to be paid; and a statute which protects the purchaser from liability in such a case would be alike impolitic and unjust. Cases which are difficult of determination are those which partake in some degree of both the classes referred to, yet fall decidedly within neither. Contracts for goods upon which some labor must be bestowed to prepare them for delivery, and which, when ready for delivery, are vendible in the general market."

That the law in relation to such contracts was considered quite unsettled in England in the ninth year of the reign of George IV., is obvious from the act of parliament of that year, amendatory of section 17 of the statute of frauds.

§ 67. In *Bird v. Muhlenberg*,¹ the general rule is admirably expressed, that the proposition should be limited, so as to embrace only such contracts as primarily contemplate work and labor to be done at the instance of the purchaser, and for his use and accommodation, so as to make the work and labor of the contracting vendor, or such as he may procure to be bestowed, at his expense, the essential consideration of the contract. In such cases, there is great reason in the distinction.

"For suppose such a case as this," said Butler, J., "that a painter contracts to deliver a certain number of paintings of a novel description, such as has been designed and suggested by the other party, and which, perhaps, would suit nobody else. In pursuance of the undertaking, materials are bought, time is lost and labor bestowed; could the contracting party for such paintings get off and be relieved because the contract was for the sale and delivery of goods?"

In the above case the goods ordered were military sashes. They were such as the plaintiff could never have had any occasion to buy in his general business. This was conceded.

In the transaction he incurred expense and trouble en-

¹ 1 Rich. (S. C.) R., 202.

tirely to accommodate the defendants; for unless the defendant and his brother officers had taken the sashes, it is hardly probable, said the court, that others would have bought them in the general course of trade.

The court say: "If the plaintiff had been a maker of such articles, and had made such sashes as these for the defendant, the contract would have been regarded as one for work and labor, as well as for goods to be delivered." Clearly as much so as if a tailor had made a new-fangled dress for a peculiar individual, and such as would, perhaps, suit no one but the person who bespoke it.

The judgment in favor of the plaintiff was affirmed.

§ 68. So in *Bates v. Coster*,¹ where the contract was made for the sale of a colt, to be delivered at a future time, gelded and well, at an agreed price, and the animal was present before the contracting parties; but the labor, expense and risk of the operation of gelding were for the seller.

The contract not being in writing, nor any part of the price paid, it was declared to be a contract of sale, and accordingly void within the statute of frauds.

Bockes, J., substantially held that, as there was no element of manufacture involved in the agreement in the case, and no idea of compensation for work and labor as such, the contract was not enforceable by law.

§ 69. The case of *Winship v. Buzzard*² arose out of a verbal contract for the alleged purchase of a cotton-gin, which the defendant contracted to buy of the plaintiffs, through their agent.

The statute of frauds of South Carolina was then and is now the same as the English statute.

The court held that the statute applied to contracts for the sale of goods, wares and merchandise, but a distinction had been taken between contracts of sale merely, and contracts for the sale of goods, upon which work and labor were previously to be bestowed.³

¹ 1 Hun, 400; 3 Supm. Ct. (T. & C.), 580.

² 9 Rich. Law R., 103 (1855).

³ *Bird v. Muhlenberg*, 1 id., 199.

It was also said that sales of goods which exist *in solido*, at the time of sale, although the contract be executory and the goods are to be delivered at a different place, are within the statute of frauds.¹

But a contract for a chariot to be made;² for a quantity of oak pins to be cut and delivered;³ for a quantity of corn to be threshed out;⁴ has been held not within the statute of frauds. The court decided that the plaintiff could not recover, unless work and labor were to be bestowed on the gin, and as the evidence on this point was inconclusive, the nonsuit was set aside, leaving the question for the jury whether the parties understood that the contract was for the sale of the gin merely, or for a sale on which work was to be bestowed.

§ 70. The controversy between the plaintiffs and the defendants, in *Pawelski v. Hargreaves*,⁵ was whether an order for three brewery trucks, which the plaintiffs at Paterson, New Jersey, sought to fill by furnishing them from the Milburn Wagon Company's works, at Toledo, Ohio, fell within the statute of frauds as to the sale of goods, wares and merchandise, for the price of \$30, or upwards, and therefore void; or whether the plaintiffs were only the agents by whom the defendants made this purchase of the Milburn Wagon Company.

It was shown that the trucks were existing at the time of the contract, *in solido*, and were not to be made according to order; nor as things distinguished from the general business of the plaintiffs, for they were in the direct line of their business, and with that knowledge the defendants sought them to obtain the trucks.

It was held that whether the trucks were in the salesroom of the plaintiffs, ready for delivery with slight alterations

¹ *Cooper v. Elston*, 7 T. R., 14.

² *Towers v. Osborne*, Str., 506.

³ *Groves v. Buck*, 3 M. & S., 178.

⁴ *Clayton v. Andrews*, 4 Burr., 2101.

⁵ 47 N. J. R., 334, Scudder, J.; Benjamin on Sales, Corbin's ed., vol. 1, p. 121.

and adaptations, or were in the *salesroom of their business correspondent in a distant city*, it could make no difference. It was a contract of sale within the statute. Accordingly, the judgment rendered for the plaintiffs in the court below was reversed.

§ 71. In general the courts have held that it is for the jury to determine whether there has been a complete performance of a contract for the sale of goods.

Thus, in *Weightman v. Caldwell*,¹ where C. agreed to sell to W. his share in a cargo afloat in the ship *Aristides* (Z. supercargo), at fifteen per cent. advance on a stated amount, payable at five months from the date, and to give his notes with an approved indorser, and in compliance therewith W. did give his notes; and in an action thereon, the want of consideration under the statute of frauds, being set up as a defense, on the ground of the defect of mutuality in the written contract, the court below left it to the jury to say from the evidence whether an actual performance of the agreement was had, and the jury having found that there was, and found a verdict for the plaintiff, the supreme court of the United States affirmed the judgment.

¹⁴ Wheaton, 85.

CHAPTER IV.

WHAT CONTRACTS ARE WITHIN THE STATUTE OF FRAUDS. THE ENGLISH RULE OF CONSTRUCTION.

- § 72. A contract for an article which at the time of delivery is the subject of sale is within the statute of frauds.
- 73. The same subject; Mr. Justice Blackburn's views.
- 74. Construction of the statute; some early cases.
- 75. Tendency of the cases toward a liberal construction.
- 76. The new English doctrine; *Downs v. Ross*.
- 77. Where the subject of the contract exists *in solido*; conflicting authorities.
- 78. Where work is to be done on the article by the seller, or by the buyer.
- 79. Rule where the goods are usually produced by the manufacturer; nice distinctions required.
- 80. As to executory contracts; *Towers v. Osborne*.
- 81. The same subject continued.
- 82. Rule adopted in a Maryland case.
- 83. Lord Mansfield's views as to executory contracts under the statute of frauds.
- 84. The statute of frauds extends to executory contracts; *Rondeau v. Wyatt*.
- 85. The same subject continued.
- 86. The rule of *Garbutt v. Watson*.
- 87. Where labor enters into the consideration of the contract.
- 88. Where, by the contract, a chattel is ultimately to be delivered, a sale; the case of *Lee v. Griffin*.
- 89. The same general subject; a case *sui generis*; *Clay v. Yates*.
- 90. Rule laid down by Pollock, C. B., rejected by some authorities.
- 91. What is an entire contract.
- 92. Contract for work and labor; *Grafton v. Armitage*.
- 93. Distinctions drawn as to contracts of sale and for work and labor.
- 94. Example of a mixed contract for chattels and work and labor; *Smith v. Surman*.
- 95. Another example; *Watts v. Friend*.

§ 72. A review of the decisions which have given expression to the meaning of the statute of frauds on this subject

show the rule, as established in England, to be substantially as follows: If the subject-matter of the contract is to be manufactured, and when manufactured it will *result in a sale*, or can be regarded as goods capable of sale, by the manufacturer, *at the time of delivery*, without regard to the question whether the subject-matter were in existence or not when the contract was made,—it is deemed a sale, and falls within the operation of the statute.

But this rule of construction does not obtain in respect to those contracts where work is done upon the goods of another, or even where materials are supplied or added to the goods of another.

If, therefore, certain labor and materials be furnished in repairing an article, it would simply be a contract for work and labor, and not of sale. On the other hand, if the article be produced by labor and materials, which would result in a thing which could be a subject of sale, the contract would be within the statute.¹

§ 73. Thus, Blackburn, J., in *Lee v. Griffin*,² substantially says, that if the contract be such that it will result in the sale of a chattel, then it constitutes a sale; but if the work and labor be bestowed in such a manner as that the result would not be anything which could properly be said to be the subject of a sale, then an action for work and labor is the proper remedy. In *Clay v. Yates*, *supra*, the circumstances were peculiar; but had the contract been completed, it could scarcely perhaps have been said that the result was the sale of a chattel. He says: "I do not think that the relative value of the labor and of the materials on which it is bestowed can in any case be the test of what is the cause of action; and that if Benvenuto Cellini had contracted to execute a work of art for another, much as the value of the skill might exceed that of the materials, the con-

¹ Some cases in Minnesota have followed the same rule: *Phipps v. McFarlane*, 3 Minn., 109; *Brown v.*

Sanborn, 21 id., 402; and see, also, *Howe v. Palmer*, 3 B. & A., 321.

² 1 B. & S., 272; 30 L. J. Q. B., 252; *Benj. on Sales*, pp. 102, 103.

tract would have been (none) the less for the sale of a chattel."

Hill, J., thought the decision in *Clay v. Yates*¹ the correct one.

Mr. Benjamin, referring to *Lee v. Griffin*, says that, from the very definition of a sale, the rule would seem to be at once deducible, that if the contract is intended to result in transferring for a price, from B. to A., a chattel in which A. had no previous property, it is a contract for the sale of a chattel, and, unless that be the case, there can be no sale.

§ 74. As already observed, section 17 of the English statute of frauds has been in effect adopted in most of the states of this country. It has been a fruitful subject of litigation for nearly two centuries.

From the case of *Towers v. Osborne*,² in 1724, to *Garbutt v. Watson*,³ in 1822, in England; and from *Eichelberger v. McCauley*,⁴ decided in Maryland, in 1766, to *Downs v. Ross*,⁵ decided in New York, in 1840, embracing the palmy days of the courts of both countries, there seems to have been, if not an uniform construction, at least a concurrence in the principles upon which the decisions rested, namely, to give to the statute a strict construction; and not to hold any case within it, unless the article which was the subject of sale was in a condition for delivery at the time of the making of the contract.

Hence, contracts for the sale of any article which had to be changed in form, or upon which work and labor had to be bestowed by the seller to put it in condition for delivery, were adjudged to be contracts for work and labor, and not of sale.

¹ 1 H. & N., 73.

² 1 Strange, 506.

³ 5 B. & A., 613.

⁴ 5 Har. & John., 213.

⁵ 23 Wend., 270. The following cases also bear out the above observations: *Rondeau v. Wyatt*, 2 H. Bl. (1792); *Groves v. Buck*, 3 Maule

& Sel., 178 (1814); *Cruikshank v. Burrell*, 18 Johns. R., 58 (1820), *Spencer, C. J.*; *Hardell v. McClure*, 1 Chandler's (Wis.) R., 271; *Atkinson v. Bell*, 8 Barn. & Cres., 277 (1828); *Smith v. Surman*, 9 B. & C., 568 (1829); *Newman v. Morris*, 4 H. & McH. (Md.), 421 (1799).

§ 75. In *Hardell v. McClure*,¹ the court was constrained to say that, construing the provisions of section 17 by the well known meaning of the language employed, it must be admitted that the earlier decisions confine it to a *narrow* and *technical* scope, and if the policy of the act was not misconceived, the courts were bound to give to it a *fair and liberal construction*.

The court believed that the rule established in *Garbutt v. Watson*² should have been adopted in the *first instance*; and that the rule enunciated in *Downs v. Ross*³ was in accordance with reason and *sound public policy*.

In view of the more recent authorities, it may be observed that it is not a little singular that the idea ever prevailed that the statute of frauds was only applicable to cases where the bargain was to be immediately consummated.

§ 76. The case of *Downs v. Ross*⁴ (1840), which sustained the *new* English doctrine, arose out of a contract for the delivery of certain wheat, the larger part of which was unthreshed at the time the contract was made; and which the vendor agreed to put in condition for delivery.

The facts and decision of the case have already been stated at considerable length in another section.⁵ In a powerful and luminous judgment, Bronson, J., held it to be a contract of sale.

Down to that time, no other court in this country had departed from the *old* English doctrine holding that such contracts were essentially for work and labor.

The conflict between what may be called the *old* and the *new* doctrine of construction, in such cases, was effectually settled in 1828, by the enactment of the statute of 9 Geo. IV., commonly called Lord Tenterden's act, which, while establishing no new principle, in plain and explicit language, it gave the true construction of the statute of frauds, and set at rest many vexed questions.

¹ 1 Chand. (Wis.) R., 271.

² 8 Barn. & Ald., 613.

³ 23 Wend., 270.

⁴ 23 Wend., 270; *Cason v. Cheely*,

6 Ga., 555.

⁵ § 45.

For example, take the case of *Hibblewhite v. McMorine*,¹ where a contract was entered into for goods to be delivered at a future day; and notwithstanding the circumstance that the vendor neither had the goods in his possession at the time, nor had contracted to purchase them, nor had any reasonable expectation of procuring them by the time appointed for delivering them, except by purchasing them after making the contract, the court held the contract to be valid.

§ 77. In general, while some of the cases in England and in this country hold that if the subject of contract exists *in solido*, to use the expression of the old cases, although something yet remains to be done by the seller to make the article marketable, or to suit the wants of the buyer, the contract is within the statute of frauds,² other leading cases have held that if the article is not *in esse* and cannot then be delivered by reason of its incomplete condition, but must undergo alteration, construction or manufacture, the contract is for work and labor, and therefore *without* the statute of frauds.³

In *Rondeau v. Wyatt*, *supra*, Lord Loughborough thought the case of *Towers v. Osborne*, *supra*, was plainly out of the statute, because "it was for work to be done, and materials and other necessary things to be found, which is different from a mere contract of sale, to which species of contract alone the statute is applicable."

Mr. Benjamin says that the decision in *Towers v. Osborne* was "wrong" if it went upon the ground that Lord Loughborough states, namely, that the order for the chariot was not a contract or agreement for the sale of a chattel.

But there may be found several cases in this country which would seem to lead to the conclusion that the decision in that case was right.⁴

¹ 5 M. & W., 462; 3 Jur., 509.

⁴ Maule & Sel., 262; *Watts v.*

² *Rondeau v. Wyatt*, 2 H. Bl., 63 (1792); *Cooper v. Elston*, 7 T. R., 140 (1796); *Garbutt v. Watson*, 5 B. & A., 613 (1822); *Astey v. Emery*,

Friend, 10 B. & C., 446.

³ *Clay v. Yates*, 1 H. & N., 73.

⁴ *Mixer v. Howarth*, 21 Pick., 205; *Cummings v. Dennett*, 26 Me., 397;

§ 78. And again, other cases have held that the question whether the contract is of *sale*, or for work and labor, may be determined by inquiring whether the work to be done upon the article is for the *seller* or the *buyer*; if for the latter, it is for work and labor; if for the former, it is a contract of sale.¹

§ 79. The distinction between a contract for the manufacture of an article such as the manufacturer produces in the usual course of his business, and a contract upon a special order for an article not usually produced by him, may be readily determined.

The greater difficulty arises in distinguishing between the former class of contracts, and a contract for an article which exists *in solido*, but upon which certain work is to be bestowed to render it fit for the market, or to suit the wants of the buyer. In cases arising under the latter class it is difficult to establish a criterion. For there at once arise nice distinctions as to whether the work, labor and materials furnished amount to a construction and fabrication, or only to a repairing or modification of the article.

A reference to the cases will be found useful in showing in what different lights these several questions have been presented for adjudication.

§ 80. The doctrine that contracts which are not intended to be immediately executed are not within the meaning of the statute of frauds, first judicially announced in *Towers v. Osborne*,² was afterwards followed by Lord Mansfield, in *Clayton v. Andrews*.³

The case of *Towers v. Osborne* arose out of a verbal contract to make and furnish a *chariot*, which, when completed, the defendant refused to take. Lord Chief Justice

Abbott v. Gilchrist, 38 Me., 260; (1861); 30 L. J. Q. B., 252; *Gard-Donovan v. Willson*, 26 Barb., 138; *ner v. Joy*, 9 Met., 179; *Clay v. Goddard v. Binney*, 115 Mass., Yates, 1 H. & N., 73.
450.

² 1 Strange, 506; *Mucklow v.*

¹ *Atkinson v. Bell*, 8 B. & C., 277; *Mangles*, 1 Taunt., 318; *Buxton v. Smith v. Surman*, 9 B. & C., 568; *Bedal*, 3 East, 303.

Lee v. Griffin, 1 Best & S., 272 ³ 4 Burr., 2101 (1767).

Pratt, at *Nisi Prius*, held that the statute of frauds did not apply to *executory contracts*, but related only to contracts for the *actual sale of goods* where the buyer was immediately answerable, without time given him by special agreement, and the goods were to be delivered *at once*. This was in 1724. The decision was for a time referred to with approval, but the policy of it has long since been rejected. Subsequent cases have quite uniformly held that all such contracts fall within the operation of the statute. Notably, *Rondeau v. Wyatt*,¹ where Lord Loughborough emphatically rejected *Clayton v. Andrews*, and, as shown by other cases, that decision was *wrong*.

§ 81. In the early case of *Newman v. Morris*,² in Maryland, the contract was for the purchase of four hundred pounds of cheese, to be paid for on delivery. The plaintiff had the cheese in his possession about two miles from Port Tobacco, where the contract was made, and where the cheese was to be delivered.

The defendant claimed he was not bound by the contract, as there was no memorandum signed by him, no earnest paid, nor any part of the goods delivered. While the plaintiff contended that it was an *executory contract*, and not within the operation of the statute of frauds.

The court below, Stone, C. J., following the then current English decisions, held that the defendant was not bound by the contract, and the judgment was affirmed on appeal.

§ 82. So also in *Eichelberger v. McCauley*,³ it appeared that the defendant verbally agreed with the plaintiff to deliver to him eight hundred bushels of wheat, which was then unthreshed and in the straw (and so understood between the parties), on or before Christmas (about six weeks off), if the weather would admit of the wheat being gotten out by that time, for which Eichelberger agreed to pay \$1.65 per bushel, on delivery. The weather did admit of

¹ 2 H. Bl., 63; *Groves v. Buck*, 3 M. & S., 178.

² 4 H. & McH. (Md.), 421.

³ 5 H. & J. (Md.), 213.

the wheat being threshed out by or before Christmas, but the defendant refused to deliver it.

The court below decided that the case was within the operation of the statute of frauds. After referring to *Rondeau v. Wyatt*,¹ and *Clayton v. Andrews*,² and the distinction drawn in the cases generally, the court said it did not intend to push the rule further than the circumstances of the case of *Clayton v. Andrews* would justify, and they must not, therefore, be understood to extend it to cases where the articles sold are not to be prepared for delivery by work and labor, and when the work and labor may not be considered in some measure a part of the contract.

The contract was held to be for work and labor, and the judgment was reversed.

The above decision is at variance with the more recent English cases, but at that time it was in accord with the adjudged cases.

§ 83. In *Clayton v. Andrews*,³ the contract was for the future delivery of certain wheat, which had to be threshed before it was delivered.

In that case the gist of Lord Mansfield's decision went to the point that the statute of frauds was not applicable to *executory contracts*. The distinction there drawn has been considered "more nice than wise." Such deference, however, was paid to the construction given to the statute in that powerful judgment, that the court of king's bench adopted it, although some of the cases struggled for a time to find other grounds on which to support the decision.

Mr. Justice Grose, in *Cooper v. Elston*,⁴ speaking of Lord Mansfield's opinion, said: "If by that were meant contracts for the sale of goods to be executed on a *future day*, such a construction would be a repeal of the act; but if it only

¹ 2 H. Bl., 63.

² 4 Burr., 2101.

³ 4 Burr., 2101 (1767). See, also, *Jackson v. Covert*, 5 Wend., 139; *Sewall v. Fitch*, 8 Cow., 215; *Astey v. Emery*, 4 Maule & Selw., 262.

Garbutt v. Watson, 5 B. & A., 613;

Bennett v. Hull, 10 Johns., 364;

⁴ 7 Term R., 14 (1796); *Groves v.*

Buck, 3 Maule & Selw., 178.

meant such contracts as were incapable of being executed at the time, then the decision was right."

And Lord Loughborough, in *Rondeau v. Wyatt*,¹ apologetically observes, that "there was some work to be performed, for it was necessary that the wheat should be threshed before the delivery," and he declares at the same time that it is a *nice distinction*. But, as already observed, he discarded the decision of Lord Mansfield in every possible view. The policy of the judgment in *Rondeau v. Wyatt*, *supra*, has since been the rule of the English courts. That case was decided over thirty years before Lord Tenterden's act, which extended the application of section 17, in so many words, to contracts for the sale of goods intended to be delivered at a future time.

§ 84. In *Rondeau v. Wyatt*,² the contract was for the sale of three thousand sacks of flour, to be shipped on board certain ships in the river Thames. The flour existed in the very shape and substance in which it was to be delivered. The sacks were to be shipped for foreign ports, at 41s. per sack, but the defendant afterward refused to deliver the same, for which breach damages were claimed.

Lord Loughborough in a lucid and able judgment held that the contract was clearly within the statute of frauds; that the circumstance that the sacks were to be thus shipped on board of vessels provided by the buyer, for transportation, did not affect the question; and that the statute would not be of much use unless it were to extend to executory contracts.

It may be reasonably presumed that the statute of frauds was designed to prevent the uncertainty and confusion arising in all such cases.

§ 85. So, in *Astey v. Emery*,³ where the agreement was that an additional price should be paid by the vendee to the vendor for certain goods, by reason of their being deliv-

¹ 2 H. Bl., 63.

¹¹; *Smith v. Surman*, 9 B. & C.,

² 2 H. Bl., 63; *Leake on Cont.*, 561.

¹³⁷; *Wilks v. Atkinson*, 6 Taunt., ³ 4 Maule & Selw., 263.

ered to the vendee at a considerable distance from the place of sale, but afterward no separate charge was made, the contract was declared to be within the statute of frauds.

§ 86. In further illustration of the *new* English rule, take the case of *Garbutt v. Watson*.¹ There the defendant, a corn merchant, verbally agreed to purchase of the plaintiffs, who were millers near *Hull*, one hundred sacks of flour, not yet ground, to be prepared and shipped at a future day. There was no memorandum in writing of the contract, nor any earnest paid. This is a stronger case, if anything, than *Clayton v. Andrews*,² and all the judges concurred in the opinion that the case of *Clayton v. Andrews* *could not be* supported.

Abbott, C. J., said the plaintiffs ground the flour for the purpose of general sale, *and sold this quantity to the defendant as part of their general stock.*

Bayley, J., thought it was substantially a contract for the sale of flour, and that it was quite immaterial whether the flour was at the time ground or not. It was a contract for *goods*, he said, and came within the meaning of the statute of frauds. Best and Holroyd, concurred.

The *statute* in the above case was, as Abbott, C. J., always said it ought to be, reasonably construed.

§ 87. In *Rentch v. Long*,³ the subject of the contract was two thousand bushels of corn, which at the time was in the field ungathered and unshucked, and which, by the contract, the plaintiff was entitled to have delivered to him at a future time, gathered and shucked.

In this case, the corn was not at the time of the contract in a condition for delivery, and the jury were warranted in finding that work and labor were necessary to be done and formed a part of the consideration for the price to be paid.

The facts in the case are very similar to those in *Eichelberger v. McCauley*,⁴ where the labor which entered into

¹ 1 D. & R., 219; and 5 B. & A., 613, S. C.

³ 27 Md., 188.

⁴ 5 Har. & John., 213.

² 4 Burr., 2101.

the consideration of the contract was the threshing of the wheat; here it was the gathering and shucking of the corn. "So that," says the court, Bartol, J., "the cases are identical in principle."

Judgment in favor of the plaintiff was affirmed.

§ 88. The conflict of opinion which has existed in England may in a degree be illustrated by the cases of *Lee v. Griffin*,¹ and *Clay v. Yates*.²

The former action was to recover 21*l.* for two sets of artificial teeth ordered by the defendant's testator. There the plaintiff, in pursuance of the order, prepared a model of her mouth and made two sets of artificial teeth. When they were ready he wrote, requesting her to appoint a day when he could fit them. She died before the teeth were fitted.

Blackburn, J., said: "I think that in all cases, in order to ascertain whether the action ought to be brought for goods sold and delivered, or for work and labor done and materials provided, we must *look at the particular contract entered into between the parties*. If the contract be such that, *when carried out*, it would *result in the sale of a chattel*, the party cannot sue for work and labor; but if the result of the contract is that the party has done work and labor which ends in nothing that can become the subject of a sale, the party cannot sue for goods sold and delivered."

In that case, he thought that the contract was to deliver a thing which, when completed, would *result in the sale of a chattel*; in other words, the substance of the contract was for goods.

He did not think that the test to apply in such cases should be whether or not the value of the work exceeded that of the materials used in the execution. For, he says, "if a sculptor were employed to execute a work of art, greatly as his skill and labor, supposing it to be of the highest description, might exceed the value of the marble

¹ 1 Best & Smith, Q. B. R., 277; Armitage, 2 C. B., 340; 15 L. J. 30 L. J. Q. B., 252. C. P., 20

² 1 H. & N., 73 (1856); *Grafton v.*

on which he worked, the contract would, in my opinion, nevertheless be a contract for the sale of a chattel.”¹

In the same case, Compton, J., said: “Where the contract is such that a chattel is ultimately to be delivered by the plaintiff to the defendant, when it has been sent, then the cause of action is goods sold and delivered.”

It was held in *Isaacs v. Hardy*,² that a contract by an artist with a picture dealer, to paint a picture of a given subject at an agreed price, is a contract for the sale of a chattel, and within the statute.

By some of the decisions in this country, the painting of a picture by an artist, which would be a thing of general sale in the market, is held to be goods; but if a picture is painted upon a special order, and not the subject of general sale, it would be without the statute of frauds.

§ 89. *Clay v. Yates*³ was a case *sui generis*. There the plaintiff, a printer, contracted to print a second edition of a work previously published by the defendant. The plaintiff was to furnish the materials, including the paper.

It was decided that this was not a contract for the sale of a thing to be delivered at a future time, nor a contract for making a thing to be sold when completed, but a contract to do work and labor and furnishing materials; and was *not governed by Lord Tenterden's act*.

The case turned upon the peculiar circumstances involved.

Pollock, C. B., said: “In such cases it seems to me the criterion is, whether work *is the essence of the contract*, or whether it *is the materials supplied*. My impression is, that in a case of a work of art, whether in gold, silver, mar-

¹ Note: Suppose the work of a sculptor were a bust of a private citizen, which would be of little or no value in the market, or, in fact, to any one except the person for whom it was made. Could it reasonably be said that the bust would be a sale of a chattel? It would seem not, under the current line of decisions.

² 1 C. & E., 287. See *Wright v. O'Brien*, 5 Daly (C. P. C.), 54.

³ 1 H. & N., 73; 25 L. J. Ex., 237; *Bensley v. Bignold*, 5 B. & Ald., 335.

ble or plaster, where the application of skill and labor is of the highest description, and the material is of no importance as compared with the labor, *the price may be recovered as work and labor and materials.*"

He further said: "I am inclined to think that it is only where the bargain is for *goods* thereafter to be made, and *not* where it is a mixed contract for work and materials to be found, that Lord Tenterden's act applies." The reason, perhaps, why very few cases on this subject are found in the books is, that before that act the statute of frauds was held not to apply to the case of goods not actually made, or fit for delivery at the time of the contract.

Martin, B., in the same case, after stating what the defendant was required to do under the contract, said: "It seems to me that *the true criterion is this,—suppose there was no contract as to payment, and the printer* [the plaintiff in the case] *had brought an action to recover what he was by law entitled to receive*, would that be the value of the book as a book? *I apprehend not*; for the book might not be worth half the value of the paper on which it was printed, but he would be entitled to recover for his work, labor and materials supplied; therefore this is, in strictness, work, labor and materials done and provided by the plaintiff for the defendant."

In commenting upon the above case, Mr. Justice Stephen observes: "A book is more than a bare combination of ink and paper. I should say that the materials used in making it had ceased to exist as such, and that the new product was the property of the employer, subject to the printer's lien and other remedies for the price of his labor."¹

§ 90. The test laid down by Pollock, C. B., "whether the work and labor is the essence of the contract, or whether it is the materials that are found," is irreconcilable with the opinions of Blackburn and Compton, JJ., in *Lee v. Griffin*,² and is rejected by them. Mr. Benjamin remarks, also, that

¹ 1 Law Quarterly Review, 10.

² 1 Best & Smith, Q. B., 277; 30 L. J. Q. B., 252.

this view cannot be supported, even in the extreme case put by Martin, B.,¹ of a portrait worth three hundred guineas on a canvas worth 10s. He says: "If the employer owned nothing whatever that went into the composition of the picture; if neither materials nor skill nor labor were supplied by him, it is obvious that he cannot get title to the picture or any property in it, except through a transfer of the chattel to him by the artist for a price, and this is in law a contract of sale. It cannot make the slightest difference in what proportions the elements that compose the chattel, namely, the raw material and the skill, are divided."²

And he further observes that the test suggested by Martin, B., in his opinion in *Clay v. Yates*, is accurate as far as it goes.

§ 91. In *Blake v. Nicholson*,³ a printer was employed by one Stratford to print eight thousand seven hundred and fifty copies of a work. Stratford supplied the paper for such printing from time to time as required. The printer delivered five thousand nine hundred and eighty-seven copies; the rest remained in his own warehouse. Under the requirement the printer made a separate charge for each number of the work.

Stratford afterward became a bankrupt. There it was held that the assignees of Stratford were not entitled to recover from the printer the copies *remaining in his possession* upon tendering to him so much as was due for the printing of the copies in proportion to his charge for the whole.

Lord Ellenborough, C. J., said: "I think the defendant had a lien for the whole balance, the work being an entire work in the course of prosecution, upon the same principle that a tailor, who is employed to make a suit of clothes, has a lien for the whole price upon any part of them. It would be inconvenient if he was obliged to make stops in the course of the work; the nature of the work affords a reason for his general lien." And, added Le Blanc, J., the supplying the

¹ *Clay v. Yates*, 1 H. & N., 73.

³ 3 M. & S., 167.

² Benjamin on Sales, 106.

paper from time to time did not make it the less *one entire work*. Clearly it was an entire contract, and out of the statute of frauds.

§ 92. So in *Grafton v. Armitage*,¹ where the plaintiff, a working engineer, was employed by the defendant to devise some plan for a machine for curving metal tubes for the manufacture of a life-buoy which the defendant had invented. The action was for work, labor and materials and the debt due thereon. The particulars were, "for scheming and experimenting for, and making a plan-drawing of, a machine, etc., engaged three days, at one guinea per day, 3*l.* 3*s.*; for workman's time in making, etc., and experimenting therewith, 1*l.* 5*s.*; for use of lathe for one week, 12*s.*; for wood and iron to make the drum, and for brass tubing for the experiments, 5*s.*"

It was insisted by the defendant that the action should have been *case for non-acceptance of the article*.

Tindal, C. J., said that "here there never was any intention to make any thing that should properly become the subject of an action for goods sold and delivered. But the plaintiff was applied to to point out the proper mode of attaining a given object, and he brings his action for the work and labor done by him, and the materials used in the performance of that which he undertook to do." . . . He thought the count for work and labor the proper one to cover such a claim.

§ 93. In distinguishing the above case from *Atkinson v. Bell*,² which was a case where a manufacturer of machinery was employed by the defendants to make two spinning-frames, the chief justice observed that the substance of the contract in that case was goods to be sold and delivered by the one party to the other. In the last named case Bayley, J., said, "if you employ another to work up his own materials in making a chattel, then he may dispose of the produce of that labor and those materials to any other per-

¹ 2 C. B., 340.

² 8 B. & C., 277.

son. No right to maintain any action vests in him during the progress of the work; but, when the chattel has assumed the character bargained for, and the employer has accepted it, the party employed may maintain an action for goods sold and delivered; or, if the employer refuses to accept, a special action on the case for such refusal."

And he held that the rule for entering a nonsuit must be discharged. Coltman, Maule and Erle, JJ., concurred. Coltman observed that, if this had been a contract by the plaintiff to *make a machine* for the defendant, the proper remedy would have been by an action for goods sold and delivered, or an action for not accepting the machine. But here the plaintiff was simply employed to use his skill in devising a mode of carrying out the defendant's invention.

It is laid down by Bayley, J., in *Atkinson v. Bell*,¹ that to support an action for work and labor, that on which the work is performed must be the property of the defendant, the employer.

But in the same case it was said by Maule, J., that, "In order to sustain a count for work and labor, it is not necessary that the work and labor should be performed upon materials that are the property of the *plaintiff* (*sic* clearly meaning *defendant*), or that are to be handed over to him."

§ 94. In *Smith v. Surman*² the defendant agreed to purchase a quantity of timber of the plaintiff; the verbal contract was held to be within the statute, notwithstanding a part of the trees were not felled at the time of the bargain, and were afterwards to be cut by the vendor. The court denied that it was "a mixed contract for goods and chattels, and for work and labor to be bestowed and performed" by the vendor for the vendee, but that it was "a contract for the future sale of the timber, *when it should be in a fit state for delivery*. The vendor, in felling the timber and preparing it for delivery, was, in my opinion, *doing work for himself*, and not for the vendee."

¹ 8 B. & C., 277.

² 9 B. & C., 561.

§ 95. *Watts v. Friend*¹ is still stronger. There the contract was for the sale of a crop *to be raised*, the seed not having yet been put into the ground. It was held to be a sale, and void under the statute of frauds, without writing, earnest or part payment.

Littledale, J., said: "A contract for *mere* work and labor is not expressly mentioned, and may therefore not be within the statute; but where the contracting parties contemplate a sale of goods, although the subject-matter, at the time of making the contract, *may not exist as goods, but is to be wrought into that by the vendor's bestowing work and labor upon his raw materials*, that, in my opinion, is *a case within the statute*;" and, he further added, "it appears to me to be sufficient, if, at the time of the completion of the contract, *the subject-matter*, be goods, wares and merchandises."

In *Marshall v. Green*,² Lord Coleridge, C. J., referring to the case of *Smith v. Surman*, says: "The only distinction that I can see between that and the present case, is that there the trees were to be cut by the vendor;" but Littledale, J., held that "if in that case the contract had been for the sale of the trees, with a specific liberty to the vendee to enter the land to cut them, it would not have given him an interest in the land within the meaning of the statute."

"It may be difficult in many cases," said Colt, J., in *White v. Foster*,³ "to determine, from the terms of the contract, whether the parties intend to grant a present estate in the trees while growing, or only a right, either definite or unlimited, as to time to enter and cut, with a title to the property when it becomes a chattel. If the former be the true construction, then the contract comes within the statute, and must be in writing; if the latter, then, though wholly oral, it may be enforced."

¹ 5 Man. & Ryl., 439, and 10 Barn. & Cres., 446, S. C.

² 1 C. P. Div., 40.

³ 102 Mass., 378.

CHAPTER V.

OF CONTRACTS WITHOUT THE STATUTE OF FRAUDS.

- § 96. A general rule governing contracts of sale.
- 97. Of the sale of goods not *in solido*; case of *Sewall v. Fitch*.
- 98. Example of a contract without the statute of frauds.
- 99. The same subject continued.
- 100. The same subject continued.
- 101. Contracts to manufacture goods are not within the statute; the important case of *Parsons v. Loucks*.
- 102. The same subject continued.
- 103. Same subject; construction of the words, "sale of any goods."
- 104. Same subject; a dissenting opinion.
- 105. Instance of an article being manufactured and destroyed by fire before delivery.
- 106. What are contracts for work and labor.
- 107. Contracts in part good and part bad may be available *pro tanto*, when.
- 108. What is a sale, and what an order to manufacture goods.
- 109. Goods made upon a special order not within the statute.
- 110. Another example; *Pierce v. Bouton*.
- 111. Parol contract of partition of a line fence is valid; novel case of *Ivins v. Ackerson*.
- 112. In Connecticut a contract to manufacture is held not a contract of sale; form of action in such a case.
- 113. Right of action where article is manufactured.
- 114. Of contracts of work and labor, where profits on a sale are to be divided.
- 115. Contracts for the sale of produce to be raised; law in Indiana.
- 116. Contracts held to be without the statute where work and labor to be done; some Maryland cases.
- 117. Whether an interest in a pew in church is personalty.
- 118. Contract of work to be paid for in chattels.
- 119. Contract of a partner to pay the debts of the firm, not within the statute.
- 120. A sale must be complete within the statute to sustain an action upon.
- 121. Where doubts exist as to the contract being valid, the contract will ordinarily be sustained; *Phipps v. McFarlane*.
- 122. The work of an artist not within the statute of frauds.

§ 123. The same subject continued.

124. Same subject; the case of *Turner v. Mason*; important ruling by Campbell, C. J.
125. Contract with a tailor to make a coat not within the statute.
126. Contract not within the statute; damages may be recovered for breach of.
127. Contract to cut timber, work and labor, not within the statute.
128. Agreement to share in the profits and losses of an adventure, without the statute.
129. Various cases as to contracts partly void and partly valid, under the statute of frauds.
130. Executory contract involving a less sum than provided for in the statute of frauds — is without the statute.
131. Contract to convey certain land in consideration of services, void; right of action for services.
132. Sale of opera tickets; whether merely personal or an interest in land.
133. Part performance of contract; the statute not allowed to become an instrument of fraud.
- 133a. Requisites of part performance to take case out of the statute.
134. A void contract cannot be enforced by the party to it, much less by a third person; under the statute of frauds.
135. Another illustration; a different rule.

§ 96. There is a universality in the rule, as will appear by well established cases, that if the contract is for the work of an artisan, or for the manufacture of an article, which, except for the contract or order, would never have been made, namely, an article which is made upon a *special order*, and not such an article as is usually sold in the market, or made by the manufacturer, the contract is without the operation of the statute of frauds, and need not be evidenced by any writing.¹

¹ *Parker v. Schenck*, 28 Barb., 39; *C.*, 17 Weekly Dig., 445; 1 McMull-
Edwards v. Grand Trunk R'y, 48
Me., 380; *Goddard v. Binney*, 115
Mass., 450; *Finney v. Apgar*, 31 N.
J. Law R., 270; *Meincke v. Falk*,
55 Wis., 427; 26 Alb. Law Jour.,
510; *Donnell v. Hearn*, 12 Daly,
230; 24 Daily Reg., No. 14; S. C.,
17 Weekly Dig., 463; *Pierce v.*
Bouton, 24 Daily Reg., No. 84; S.
C., 17 Weekly Dig., 445; 1 McMull-
lare's Eq., 87; 37 Am. R., 548; *Don-*
egani v. Molinelli, 14 Lon. Com.
Jur., 106; *Phipps v. McFarlane*, 3
Minn., 100; *Pitkin v. Noyes*, 48 N.
H., 297; *Prescott v. Locke*, 51 N.
H., 96; *Fickett v. Swift*, 41 Me.,
68; *Paige v. O'Neil*, 12 Cal., 483;
Stevenson v. Irwin, 15 id., 503.

Thus, in the above cases it is in effect held that where a contract is made for an article not existing at the time *in solido*, but which article is to be made or manufactured according to order, and as a thing distinguished from the usual business of the maker or manufacturer, the contract is in substance not of sale, but for work, labor and materials.

§ 97. The action of *Sewall v. Fitch*¹ was in *assumpsit* for damages for not delivering a quantity of cut nails according to the contract. The case was tried before Duer, C. J. There, one Greele, the agent of the plaintiffs, but without disclosing their names, contracted with the defendants through their clerk for three hundred casks of Thames Manufactory cut nails at five and a half cents per pound.

Greele was told that the nails were not on hand, but could be soon made, and obtained from the manufactory at Norwich, on the opening of navigation. Greele told the clerk that he wanted the nails to fill an order. He testified in effect on the trial to the above facts, and further, that immediately upon making the agreement he reduced the same to writing and sent the same to the plaintiffs, for whose benefit he alone acted.

The memorandum was lost, but it appeared in the case that Greele disclosed the name of his principals to the defendants. The court below declared the memorandum to be sufficient; that the questions for the jury were: 1. Whether the contract was proved; and 2. As to what damages were sustained, if any.

The plaintiff had judgment; the defendant appealed.

On the appeal, Savage, C. J., held that the contract was not for the sale of goods then *in solido*; but for work and labor, in part, in the making of the articles to be delivered. A distinction in such cases is well settled both in England and New York state; that such a contract is without the statute of frauds. The motion for a new trial was denied.

§ 98. Another good illustration of the same doctrine is *Higgins v. Murray*,² where an order was given for a set of

¹ 18 Cow. (N. Y.), 215; *Donovan v. Willson*, 26 Barb., 138. ² 73 N. Y., 252; 4 Hun (N. Y.), 566.

circus tents. After they were made according to order, the plaintiff notified the defendant of their completion. No place of delivery was agreed upon, nor was anything said at the time of the contract, as to payment.

After holding the tents for two months, subject to the defendant's order, the plaintiff received a letter from the defendant requesting him to ship them to Bath, Maine, per freight, "either by boat or by cars." Subsequently the plaintiff was directed to ship them to Lewiston. The tents were accordingly shipped by boat, under a bill of lading requiring the price to be paid by the defendant to the carrier on delivery. The tents were destroyed by fire while on the boat at Portland.

Upon these facts the plaintiff was erroneously nonsuited.

The delivery of the tents to the carrier, as directed by the defendant, was tantamount to a delivery to him. The contract, as established, was clearly not within the statute of frauds, as it was for the *manufacture* of articles out of materials entirely furnished by the plaintiff.

§ 99. As no time was fixed for delivery (in the case of *Higgins v. Murray* referred to in the preceding section), under the well considered decisions the plaintiff was entitled to be paid for the tents as soon as they were completed and notice thereof given to the defendant. From that time the tents became the defendant's property, subject to the plaintiff's lien, and a right of action accrued immediately. No memorandum in writing was necessary, for it was, strictly speaking, a contract to manufacture, and had been fully performed by the plaintiff. "What the plaintiff afterward retained," said Daniels, J., "was simply a lien for the price, which was not inconsistent with its recovery by action. And all that he did by shipping the tents subject to the payment of the price was to retain and preserve that lien as his security upon the property. By the fair import of the agreement, delivery and payment were to be simultaneous acts, and that was all which the bill of lading secured.

"The contract, in judgment of law, bound the defendant to take and pay for the tents upon receiving notice that they were completed. Failing to do this he violated his contract, and the plaintiff was entitled to recover, if the jury believed his evidence, even though the property was afterward destroyed, as long as it was exposed to the risk encountered by it, without his fault and in direct obedience to the orders of the defendant."

The judgment was reversed and a new trial ordered.

§ 100. On appeal (in the last mentioned case) to the court of appeals, Church, C. J., affirmed the judgment of the general term, holding that the important question to be determined was, when the liability of the defendant attached. That if the article had been burned during the progress of construction, no action would lie, as the contract was an entirety.

The same rule would apply if the contract had been to make and deliver at a particular place, and loss ensued before such delivery.

"But," he says, "when the contract is fully performed, both as it respects the character of the article, and delivery at the place agreed upon or implied, and the defendant is notified, or if a specific time is fixed, and the contract is performed within that time, upon general principles I am unable to perceive why the party making such a contract is not liable." The liability was complete when the order for the shipment was given.¹

§ 101. In further illustration of the doctrine take the important case of *Parsons v. Loucks*.²

There the defendants agreed to manufacture, and deliver to the plaintiffs, at New York, twenty thousand pounds of book paper, of a kind similar to that which they had previously manufactured for them.

It was agreed that the paper should be manufactured and delivered as soon as the defendants had completed certain

¹See *Adlard v. Booth*, 7 Car. & P., 108.

²48 N. Y., 17; and see cases there cited.

orders on hand, which would be in about "three weeks" from the date of the contract. Thirteen cents a pound, less a discount of five per cent., was to be paid for the paper when delivered.

About two months after the contract was made the defendants informed the plaintiffs that they could not perform the contract; and this action was brought to recover damages for the breach.

The difference between the contract price and the market value of the paper at the time of the breach, as shown on the trial, amounted to \$1,930, for which the plaintiffs recovered judgment.

§ 102. On appeal (in the last mentioned case) it was claimed by the appellants, that, as the contract was not in writing, it was void within the statute of frauds. The respondents contended that the contract was for work and labor, and therefore not within the statute.¹

Hunt, C., held that the statute of frauds *did not apply* to such contracts.

"The distinction," he said, "is between the sale of goods in existence at the time of making the contract and an agreement to manufacture goods. The *former* is within the prohibition of the statute and void unless it is in writing, or there has been a delivery of a portion of the goods sold, or a payment of the purchase price. The *latter* is not."

§ 103. The New York statute of frauds specifies the "sale of any goods," assuming that the goods are already in existence at the time of the contract. This well settled distinction has been adhered to since the early case of *Crookshank v. Burrell*.²

Parsons v. Loucks is not one of the border cases, as are *Downs v. Ross*,³ and *Garbutt v. Watson*.⁴

It was a simple naked agreement by the defendants to

¹ *Sewall v. Fitch*, 8 Cow., 215; ⁴ 5 B. & A., 613; *Phipps v. McFarlane*, 3 Minn., 109; *Barnett v. Nye*,
² *Mead v. Case*, 33 Barb., 202.

³ 18 Johns., 58.

⁴ *Greene (Iowa)*, 410.

⁵ 23 Wend., 272.

manufacture at their own mills, and deliver at a specified price, a lot of paper of specified sizes, no part of which was in existence when the contract was made.

The judgment was affirmed in favor of the plaintiff. Gray, C., wrote an elaborate dissenting opinion.

Under the current decisions the contract was distinctively one for work and labor, and accordingly was not within the statute of frauds.

§ 104. Gray, C. (dissenting), in *Parsons v. Loucks*, conceded that, *prior* to the case of *Downs v. Ross*, *supra*, the contract would, by an adherence to the rule of construction established in New York, have been held to be a contract for work and labor. But that decision overturned the former cases, and he thought the court should be governed by that case and declare the contract within the statute, and so reverse the judgment.

The mere fact that the materials out of which the paper was to be manufactured were not designated, or may not have been in existence, he considered immaterial.

He thought, if in the sale of an article to be manufactured, or partly manufactured, out of the vendor's own materials, the proportion in which the labor to be bestowed to increase the value of the thing sold, is to be taken into consideration, it would be difficult to furnish a test as to the proportion, in determining the character of the contract, as between a sale and for work and labor.

§ 105. The plaintiff, in *Goddard v. Binney*,¹ agreed to make a buggy for the defendant and to deliver it at a stated time.

The defendant gave the plaintiff specific directions as to how he wanted the buggy made, as to style and finish, color of lining, the kind of seat, and the monogram for the buggy.

Some time before it was finished, the plaintiff met the defendant and asked him if he might sell it, to which the defendant answered that he would *keep the buggy*.

¹ 115 Mass., 450.

The defendant was notified when the buggy was finished, and a bill was sent for the same, which he retained and promised to see the plaintiff about it.

While the buggy was in the plaintiff's possession it was destroyed by fire.

It is clear that, if the buggy had been destroyed before it was completed, and before such notice, no recovery could be had.

Ames, J., considered the case much stronger than *Mixer v. Howarth*,¹ for it was neither *intended* nor *adapted* for the general market. That the statute of frauds did not apply, for the reason the contract was not of *sale*, and the property in the buggy had actually passed to the defendant.

Semble, in *Baker v. Bourcicault*,² where the defendant had not received notice of the completion of certain cards and only agreed to pay for them when they were delivered, the defendant prevailed in the action.

§ 106. In *Spencer v. Cone*,³ the contract was for the manufacture of certain machines under a special order; the manufacturer agreeing to furnish the materials for the purpose at a specified price. It was held to be a contract for labor and materials, and not of sale.

The decision is in harmony with *Mixer v. Howarth*,⁴ where there was a contract for the construction of a carriage from materials partly wrought at the time of the contract, but not yet put together; and Chief Justice Shaw decided that it was a contract for work and labor.

A contract made with a mechanic, or manufacturer, to construct a machine, or make an article, which is clearly *special* in its character and construction, is uniformly held to be a contract for work and labor and not of sale.⁵

§ 107. In *Irvine v. Stone*,⁶ where no recovery for the

¹ 21 Pick., 205.

² 1 Daly (N. Y. C. P.), 23.

³ 1 Met. (42 Mass.), 283 (1840);
Abbott v. Gilchrist, 38 Me., 260;

Crookshank v. Burrell, 18 Johns.
(N. Y.), 58.

⁴ 21 Pick., 205; *Muckey v. Howenstine*, 3 N. Y., 28.

⁵ *Parker v. Schenck*, 28 Barb.,

38.

⁶ 6 Cush., 508.

coal shipped could be had, it was claimed by the plaintiff that the cost of transportation ought to be recovered; but Metcalf, J., decided that it could not be. The part which respects the transportation, said the court, stands wholly on the other part which respects the sale, and which is invalid, and both must fall together. The good part of the contract cannot practically be severed from the bad and separately enforced.

Where one part of an agreement is valid, and another part is invalid under the statute of frauds, it seems to have been held in several cases that it will avail *pro tanto*, unless the statute, by necessary implication, or expressly, renders the whole void; and where the valid part can be separated from the invalid, "and be enforced without injustice to the defendant."¹

§ 108. The action of Joy v. Schoss² was brought to recover damages for the non-delivery of certain goods, known as Salisbury suitings.

The plaintiffs were merchants and agents of the Essex and Hamilton Mills, in which they owned stock. The mills made up a line of goods for the clothing trade, similar to the samples upon which the alleged sale was made.

The goods were not in existence at the time of the contract, nor was anything then said as to their being manufactured. But it was assumed in the case that they were to be manufactured.

The plaintiffs were in the habit of taking orders for goods and charging them directly to the mills; and the orders were then executed under the plaintiffs' directions.

The principal question involved in the case was, whether

¹ Duncan v. Blair, 5 Denio, 196; may be prohibited by the statute of Hobbs v. Wetherwax, 38 How. (N. frauds. Rand v. Mather, 11 Cush., Y.) Pr., 385; Fuller v. Reed, 38 7; Walker v. Lovell, 28 N. H., 138; Cal., 99; Noyes v. Humphreys, 11 . Boyd v. Eaton, 44 Maine, 51; Pecker Grattan, 636; Page v. Monks, 5 v. Kennison, 46 N. H., 488; Haynes Gray, 492. But, if any part of a v. Nice, 100 Mass., 327.
contract is valid, it will avail *pro* ² 15 Abb. N. C., 373; Meincke v. *tanto*, though another part of it Falk, 55 Wis., 427.

the transaction constituted a sale of goods, or merely an order to manufacture.

As much of the business between jobbers and their customers who manufacture clothing is conducted in a similar manner, the question was quite important.

The court held that, upon the facts as presented, it followed from an inevitable sequence that the plaintiffs were the actual manufacturers, so far as these defendants were concerned, and for the purposes of the action. The test which is to be applied to these cases, as enunciated by the New York decisions, said the court, and in further view of the facts as developed by the evidence affecting the question of manufacture on the part of the plaintiffs, the case did not come within the provisions of the statute of frauds, and accordingly a cause of action existed in behalf of the plaintiffs.

The judgment dismissing the complaint appealed from was reversed.

§ 109. In *Deal v. Maxwell*¹ a verbal contract was made whereby the plaintiffs were to procure the materials of a specified quality; to manufacture it and deliver two tons of "stocking shoddy" to the defendant, as wanted, for which the defendant agreed to pay twenty cents per pound.

The plaintiffs manufactured the shoddy, but the defendant refused to accept it.

The principal defense in the case was, that the contract was void within the statute of frauds.

The court held that it was valid.

This was a case of special manufacture. The essence of the contract being that the manufacturer was to bestow special labor and skill upon the manufacture, the contract did not fall within the operation of the statute. The goods were out of the ordinary and usual course of the business of the plaintiffs.

¹ 51 N. Y., 652; but see *Fitzsimmons v. Woodruff*, 1 N. Y. Supm. Ct., 3.

The above case, and also *Seymour v. Davis*,¹ and *Parsons v. Loucks*,² it has been said, are not sustained by the decision of any other state.³

§ 110. In *Pierce v. Bouton*⁴ the plaintiffs were manufacturers of felt goods in Pennsylvania, having a store in New York.

A sample of certain woven goods was sent by the defendant to the plaintiffs, with the inquiry whether they could imitate them in felt. The plaintiffs finished samples of the goods desired, and the defendant gave a verbal order for seventy-five pieces of them. After a portion had been delivered, the plaintiffs called on the defendant to collect the price for the portion delivered, but were put off on the ground that the goods had not been inspected. The defendant afterward refused to accept them as not being uniform in width.

As shown at the trial, the plaintiffs did not deal in such goods, and the manufacture of them required a departure from the usual business of manufacturing.

The court held the contract to be without the statute of frauds; that it was a contract for work and labor.

The governing principle of the above case was the same as in *Deal v. Maxwell*.⁵

§ 111. In *Ivins v. Ackerson*⁶ the single question presented was, whether an unwritten partition of a line fence, made by the owners of contiguous land, is, under the statute of frauds, valid or not. Against the validity of such a contract it was urged that it was void by force of the statute, which declares that no action shall be brought "upon any contract or sale of lands," etc., unless the contract be in writing. And further, that fences were a part of the free-

¹ 2 Sandf., 242.

⁵ 51 N. Y., 652.

² 4 Rob., 217; 48 N. Y., 17.

³ 1 Reid on Stat. of Fr., 249.

⁶ 9 Vr. (38 N. J.), 221; The Act, Nix. Dig., 332, p. 4. See, also,

⁴ 17 Weekly Dig., 445; 24 Daily Reg., No. 84. See, also, *Donnell v. Hearne*, 17 Weekly Dig., 463; 3 *Parsons on Cont.*, 54.

Hallen v. Runder, 1 C., M. & R., 266; *Evans v. Roberts*, 5 B. & C., 829.

hold, and go with the title, and therefore a contract concerning them was void. But Beasley, C. J., said: "This view is specious but it is not sound. It rests upon two assumptions, neither of which, I think, can be conceded. The first of these is that a fence is, out and out, a part of the land. This is not so; it is a fixture, and when annexed by the owner, will, like similar adjuncts, run with the land; but it has been abundantly adjudged that oral contracts touching fixtures of this nature *are not inoperative by reason of the statute in question.*"

To hold that a fence, in every respect, is the same as the land, and that contracts with but a collateral reference to land are avoided by the statute of frauds, is too illogical to be entertained. The purpose of the act is well expounded by Spencer, J., in *Frear v. Hardenburgh*.¹ He says: "The statute could have in view to avoid such agreements in relation to lands, as rested in parol, only where some interest was to be acquired in the land itself, and not such as were collateral, and by which no kind of interest was to be gained by the agreement in the land."

The court held that the distribution of the fence in question, made by the parties referred to, *was valid in law*.

Judgment for the plaintiff was affirmed.

§ 112. In a well considered case in Connecticut, *Allen v. Jarvis*,² it was held that a contract for the manufacture of certain articles, where the manufacturer was to furnish the materials, is not a contract of sale, but is *without* the statute of frauds. This was an action of *assumpsit*.

The plaintiff was employed by the defendant to manufacture a certain number of instruments called "surgical adjusters." After the work had proceeded and was partly finished, the defendant notified the plaintiff to discontinue any further work upon the instruments. At the time, the plaintiff had on hand a large amount of parts or portions of said instruments in different stages of manufacture, which were

¹ 5 Johns., 275.

² 20 Conn., 38. See *Atkinson v. Bell*, 8 Barn. & Cress., 277.

wholly useless to him. Also, twenty of the instruments were already completed, which the defendant refused to accept.

Assuming, says Storrs, J., that, in respect to the unfinished instruments, there was a fulfillment by the plaintiff of the contract, so far as he had proceeded with them, when he was stopped by the defendant, the question presented by the facts, as thus claimed to be proved by the plaintiff, is whether, if one employs another to make a particular chattel out of the materials of the latter, and during the progress of the work, and before it has assumed the character bargained for, it is stopped by the employer, by whom it has not been accepted and to whose use it has not in any manner been appropriated, the party employed may maintain an action for work and labor generally against the employer. The action cannot be maintained, but that a *special action on the case* against the employer is the appropriate action.

§ 113. In *Donnell v. Hearn*,¹ where the defendants agreed to pay for seven bracket lamps to be manufactured by the plaintiffs for them, and which were not such lamps as were usually kept in stock and were not usually manufactured for the purposes of sale by the plaintiffs, it was held by Van Brunt, J., that the contract must be considered as one for labor and materials, rather than for the sale of personal property as such.

It is well settled that acceptance is not necessary, where the contract is fully performed, to entitle a manufacturer to sue for the contract price of the article so to be manufactured. So, where a contract has been executed, whereby the buyer of the personal property is placed in actual possession of the same, the statute of frauds has no application.² And whether or not such facts actually exist is for the jury.³

¹ 12 Daly, 230. See, also, *Higgins v. Murray*, 73 N. Y., 252; *Bement v. Smith*, 15 Wend., 493.

² *Huntley v. Huntley*, 114 U. S., 394.

³ *Weightman v. Caldwell*, 4 Wheat., 85.

§ 114. Where the verbal contract was that, if the plaintiff would help the defendant to get certain hogs to market, he should have, as pay for his services, one-third of the profits made on the sale of the hogs, the contract was held to be without the statute of frauds.¹

Again, where certain staves were to be manufactured out of a particular lot of timber, it was held not to be a contract for the sale of goods, etc., but for their manufacture and delivery, and was held to be without the statute.²

So, also, a contract in parol to pay for improvements made upon land was decided not to be within the statute of frauds.³

In *Crockett v. Scribner*, *supra*, the court observed, the fact being found that the contract was for the manufacture and delivery of certain staves, as above stated, was held conclusive upon the parties. And under the decisions, it was held that in Maine the contract was without the statute.

And, again, an agreement was held not within the statute where the defendant was to share in the profits with the plaintiff, in a certain adventure.⁴

§ 115. In *Bowman v. Conn*,⁵ the defendant verbally agreed to sell whatever broom-corn should be raised on twenty-five acres of land, and deliver the same in merchantable condition at Madison, in the quantity of a ton every two weeks, at \$60 per ton, payable on delivery.

The statute of frauds was pleaded. There was no memorandum in writing, nor any earnest given to bind the bargain. The court cited *Watts v. Friend*,⁶ with approval. There the facts were similar, and it was held that the contract was within the statute. There the defendant agreed to sow a quantity of turnip seed on his land, the seed being

¹ *Kelsey v. Henry*, 48 Ind., 37; ³ *Godeffroy v. Caldwell*, 2 Cal., 489.
² *Crockett v. Scribner*, 64 Me., 515.
⁴ *Coleman v. Eyre*, 45 N. Y., 40.

⁵ 8 Ind., 58.
⁶ 10 Barn. & Cress., 446; 5 Man. & Ryl., 439; *Pitkin v. Noyes*, 48 N. H., 294.

furnished by the plaintiff, and sell to the plaintiff the entire crop of seed produced from such crop at a guinea per bushel. There were produced therefrom two hundred and forty bushels. Principally upon the ground that the seed was to be severed before being transferred, it was held to be a contract falling within the meaning of the statute.

In Indiana the statute of frauds is substantially the same as that of 29 Car. II., section 17, and the English construction has generally been followed in that state.

In the above case the judgment in favor of the defendant was affirmed.

§ 116. In *Renteh v. Long*,¹ the contract was for two thousand bushels of corn, which at the time was in the field ungathered and unshucked, and which, by the contract, the plaintiff was entitled to have delivered to him at a future time, gathered and shucked.

As at the time of the contract the corn was not in a condition for delivery, and as certain work and labor were necessary to be done upon it, which formed a part of the consideration for the price to be paid, the court held the contract to be without the statute.

The case falls directly within the principle established in *Eichelberger v. McCauley*,² where a contract was made for the delivery of wheat at a future time, which then was in the stack unthreshed, and it was held not within the statute of frauds. The case was decided upon the ground that work and labor being necessary to prepare the wheat for delivery, it was not a sale of goods, etc., within the meaning of the statute. The court said: The distinction between mere contracts of sale of goods, and those contracts for the sale of goods where work and labor are to be bestowed on them previous to delivery, and subjects are blended together, some of which are not in the contemplation of the statute, has too long prevailed to be at this day questioned.

¹ 27 Md., 188.

² 5 H. & J., 213.

The statute of frauds of Maryland being in effect the same as the English statute, the English decisions were followed. It need hardly be said, however, that a different rule obtains in New York and some other states.

§ 117. In *First Baptist Church of Ithaca v. Bigelow*,¹ the court say, that although the interest acquired in a pew in a church is a limited and qualified interest, it is, notwithstanding, an interest in real estate, and requires a writing to support it, if the interest extends beyond a lease for one year; where the auction in this case took place, parol leases for three years were valid. In this case it purported to be unlimited, and therefore a parol agreement for the purchase was held to be invalid. In some cases in Maine it has been decided the same way.²

§ 118. *Sutherland v. Carter* ³ was an action in replevin for a yoke of oxen held by the defendant under an agreement for their purchase. The plaintiff let the defendant have the oxen upon the verbal agreement that the defendant should own them as soon as he had done a sufficient amount of clearing on the land of the plaintiff's wife, to make up their value, which was fixed at \$100.

The work was done by the defendant. The court below held that the agreement was void under the statute of frauds. But Campbell, J., in reviewing the judgment on appeal said: "We cannot see how the statute of frauds covers such a case." The property having been delivered to the defendant upon a certain condition, the oxen became his as soon as it was performed.

The judgment in favor of the plaintiff was reversed.

§ 119. Where a partner by a valid agreement sold all of his interest in the business of the copartnership to the other partner, the other agreeing to pay all the outstanding debts

¹ 16 Wend., 32.

² *Freeport v. Bartol*, 3 Me., 340;
Gray v. Baker, 17 Me., 435.

³ 52 Mich., 151; *Detroit, Hills. &*

Ind. Railroad v. Forbes, 30 id.,
176; *Brown v. George*, 17 N. H.,
128; *Weyand v. Crichfield*, 3 Grant,

113.

of the firm, the court held the agreement to be without the statute of frauds.¹

§ 120. As to what cases properly fall within the statute of frauds, the case of *Carman v. Smick*² is another good illustration. There a verbal contract was made, whereby the defendant agreed to sell to the plaintiff a pair of oxen, the plaintiff agreeing to pay for them when weighed. The defendant refused to deliver the oxen, and the plaintiff brought his action for damages.

The court of common pleas affirmed the judgment of the court below in favor of the plaintiff. In the supreme court of judicature, however, the judgment was reversed.

The contract was entirely executory.

The facts in the case were similar to those in *Alexander v. Comber*,³ where the plaintiff had agreed to buy certain sheep, and to take them away at another time, and the defendant sold them to another person.

The court, Hornblower, C. J., in *Carman v. Smick*, decided that the statute of frauds prevented any property from vesting in the plaintiff, so as to enable him to maintain trover, there being neither earnest paid, part delivery, nor any memorandum in writing.

It is well established that in order to sustain an action it must appear that the sale is complete within the statute of frauds, so that the right of property in the thing, as well as the risk of loss, are transferred to the vendee.⁴

§ 121. In *Phipps v. McFarlane*,⁵ as it appeared, the plaintiff agreed to furnish materials for four houses, of a particular kind and size, and prepare and fit such materials for putting them up at P. B. & Co.'s mill, in Minneapolis, as soon as the materials could be prepared and fitted, and the defendant agreed to pay \$200 for each of said houses so prepared.

¹ 3 Mich., 318. See, however, *Doty v. Martin*, 32 id., 462.

² 15 N. J. R., 253.

³ 1 H. Bl., 20.

⁴ *Pike v. Vaughn*, 39 Wis., 503; *Morrow v. Reed*, 30 id., 81, 90; *Sewell v. Eaton*, 6 id., 490.

⁵ 3 Minn., 109.

The principal question upon the appeal was, whether the contract was within the statute of frauds.

The court, Atwater, J., held that it was not. He laid down the following sound rule: Where doubt exists as to the construction of a contract, with reference to the statute of frauds, the doubt should be given *in favor of sustaining the contract* rather than to declare it void.

It may well be questioned, said the court, whether the statute, in its present form, is productive of more good than evil, and there seems no good reason for giving it a wider scope than may be clearly required by the terms of the contract, to which the statute is sought to be applied.

§ 122. In general the work of an artist has been held to be a contract of work and labor, and not of sale.

In *Wright v. O'Brien*¹ an artist was employed by the plaintiff to copy in crayons, from a small photograph, a likeness of the plaintiff's child, for which he was to be paid a specified sum. Almost the sole ingredient, said the court, was his labor and skill; the materials, which consisted of the canvas upon which the work was executed, and the crayons with which it was done, being unimportant and merely ancillary to his contract for skill, work and labor. It is clear that in all such cases the contract is for work and labor and not a contract for the sale and delivery of goods, in which both delivery and acceptance are essential to the validity of the contract under the statute of frauds.

So, also, where a mechanic was employed to do work and furnish materials.²

§ 123. In *François v. Ocks*³ a portrait, as it appears, was painted under an order. After it was delivered the defendant declared it to be "a first-rate portrait," promised to pay the price and directed it to be sent to a frame-maker, where it was put in a frame and returned to the defendant.

¹ 5 Daly (N. Y. C. C. P.), 54. See, also, *Matthison v. Wescott*, 13 Vt., 261; *Wolfenden v. Wilson*, 33 U. C. Q. B., 445.

² *Courtright v. Stewart*, 19 Barb., 455; *Turner v. Mason*, 9 Western Rep., 349.

³ 2 E. D. Smith (N. Y. C. C. P.), 417.

At the trial it was proved that the portrait was actually painted by the father of the plaintiff.

The court gave judgment for the plaintiff.

On appeal, Woodruff, J., in affirming the judgment, said, in effect, that if the defendant had refused to accept the portrait on the ground that he contracted for the skill of the plaintiff himself, the action could not have been sustained. But the judgment was rendered here on the ground that the defendant was satisfied and actually accepted the work at the time of its completion.

This act took the contract out of the operation of the statute of frauds.

§ 124. In general a contract of an artist to paint a portrait, or to produce any work of art, is without the statute of frauds. The most recent, and one of the most important cases involving this point is the case of *Turner v. Mason*,¹ decided in Michigan in 1887. There the plaintiff, an artist, sued the defendant for professional work in finishing one picture and partly finishing two others.

The plaintiff had in some way obtained a likeness painted of a child of the defendant, a little boy, and after it was finished the defendant bought it.

The defendant had two little girls of whom he had photographs, and the plaintiff agreed to paint portraits from these photographs, to be finished in water colors, and to furnish frames. After these were partially finished they were not satisfactory, and it was agreed to lay this work aside and make one picture of the two little girls, life size, in pastel, from a photograph representing the two together.

The price, according to the testimony of the defendant, was to be \$150; but the plaintiff, on the other hand, averred that no price was agreed upon, and that the painting was worth \$350. A frame which cost \$50 was put up before the picture was done.

During the progress of the picture changes were made, to rectify defects chiefly of style.

¹ 9 Western Rep., 349; decided April 28, 1887.

The painting never was delivered and never tendered directly, but a bill was sent to the defendant, and a suit brought, and the plaintiff recovered a judgment for over \$200.

The defendant contended that the contract sued on was for a chattel exceeding \$50 in value, and therefore within the statute of frauds.

Campbell, Ch. J., in an able opinion said: "But we do not think it was a contract of sale." After stating that the first portrait of the little boy was a chattel already in existence as a finished picture, and was delivered as such, he said: "The other portraits were not ordered as chattels having any marketable value, but as productions involving as their only value the artistic work and labor of plaintiff, and their successful presentation of the children to be represented. It does not seem to us that there is any doubt about the fact that the whole value was to arise out of the work of the artist, on materials of no particular value, and for a result of more value to the parents than to any one else.

"We do not think the case calls for any discussion of the statute of frauds regarding sales."

The charge below directed the jury to give as damages "what this picture is worth, and what Mr. Turner's services are worth for producing the picture as it has been produced, and the frame." And in getting at the value they were told to take into consideration the exhausting studies necessary to acquire skill as an artist.

The court said: "We do not think the jury had any right to consider, or any means of judging, the value of plaintiff's work by the expense, time, or character of his studies, and there was no testimony indicating that he had reached exceptional distinction. The jury knew nothing of him beyond his local experience and standing." . . . "The pictures he made or was to make for defendant were substantially copies from photographs, and not independent original portraits, involving the labor or imagination of an original artist. But while an artist's success and his capacity to make large earnings may be due to his thorough training, yet his

work and its pecuniary value cannot be determined by any such standard."

No testimony was offered to show how much time or toil or money it cost the plaintiff to make him an artist. The judgment was reversed, all the judges concurring.

The elaborate briefs used on the one side and the other, in the above appeal, and as given at length in the Western Reporter, will be found of incalculable value to the practitioner on this and kindred subjects.

§ 125. In *Rasch v. Bissell*¹ the defendant employed the plaintiffs, merchant tailors, to make him an overcoat for \$60.

The coat was made in accordance with the designation of the defendant, and when finished it was sent to the defendant's house. He returned it in a day or two for alteration, which was made, and again was sent to the defendant and again returned by him, saying that it was not heavy enough, and the plaintiffs made the coat still heavier, and again sent it to the defendant.

The next day the defendant sent the coat back to the plaintiffs with the message that he did not want it. He had in fact bought a ready-made coat. The action was in *assumpsit*.

The plaintiffs recovered judgment. At the trial the court charged the jury as follows: "The defendant has not seen fit to come in here and offer evidence, or try the overcoat on in your presence, or bring experts to show that it was not a good fit." This was excepted to. The charge was held to be correct.

Sherwood, J., said: "The remaining assignment assumes the claim made by the plaintiffs is within the statute of frauds. This is a mistake. That question is not involved in the case."

The judgment was affirmed.

¹52 Mich., 455; 18 Northwest. Rep., 216; *Lane v. Melville*, 3 U. C. Q. B. (O. S.), 127.

§ 126. In the recent case of *The Georgia Refining Company v. The Augusta Oil Company*,¹ it appeared that numerous letters had passed between the parties, which recited the fact that the defendant was to take oil in fifty-barrel lots at forty-five cents per gallon, and also they discussed at length the situation and the differences between them.

The correspondence, as shown, comprised a sufficient note or memorandum under the statute of frauds. Besides, the contract was partly performed. The Augusta Oil Company, the plaintiffs below, recovered judgment.

The court, Jackson, C. J., in passing upon the exceptions raised by the defendant, held that "where the buyer agrees to purchase personal property from the seller, and pay a certain price for it, and then refuses to take it and pay for it, then the seller may keep it as his own and recover the difference between the market price at the time and place of delivery and the contract price, as the measure of damages for the buyer's breach of the contract." Such is the law.² He further says, "the contract is recognized in writing in many letters of the defendants, and was partly performed, either of which facts takes it *without* the statute."³ The judgment was affirmed.

§ 127. *Orman v. Hagar*⁴ was an action of *assumpsit*, brought to recover of the defendant \$1,050. The plaintiff agreed to cut, saw and deliver to the defendant, upon the line of the Texas, Santa Fe & Northern Railroad, in Santa Fe and Rio Arriba counties, one million feet of sawed railroad lumber of certain sizes, the contract to be completed December 1, 1882; that the defendant agreed to accept and receive from the plaintiff all of said lumber as fast as the same could be delivered to him, and to pay \$19.50 per thousand feet. The plaintiff entered upon the performance

¹ 74 Ga., 497.

50 Ga., 644; *Andrews v. Hoover*, 8

² *Benjamin on Sales*, § 1165; *Watts*, 239.

McCombs v. McKennan, 2 *Watts* & *Sergt.*, 219; 63 Mo., 567; *Groover, Stubbs & Co. v. Warfield*,

³ *Foster v. Leeper*, 29 Ga., 294; Code, § 1951, subsec. § 2.

⁴ 9 Pacific Rep., 363.

of the contract at once, by procuring saw-mills and necessary labor for carrying out the same, and furnished to the defendant — thousand feet of lumber, as required by said contract, but defendant afterwards refused to perform his part of the contract.

A question was raised in the case whether, under the act of 1876, the statute of frauds (29 Car. II., § 17) was adopted as part of the common law of New Mexico.

The testimony in the case showed that the lumber to be sawed and delivered by the plaintiff to the defendant was of a specified kind; that it was the kind used in constructing narrow gauge railroads, and was not the kind usually kept and sold by lumber merchants; that the timber from which the lumber was to be made stood on government land, and that defendant was to obtain permission for plaintiff to go upon this land and procure timber to be sawed.

The court, Brinker, J., after reviewing the facts and citing many cases touching the questions involved, says: "It cannot be seriously urged that this was a contract for the sale of goods, but is unquestionably a contract for work and labor, and not within the statute, even if it be held that the statute of frauds is in force here." The judgment was affirmed in favor of the plaintiff.

§ 128. Where the plaintiff was interested to the extent of one-fourth in the profits or losses of a shipment of goods undertaken by him jointly with other parties, and after the adventure had been begun, and before the goods reached their destination, the plaintiff agreed that the defendant should have one-fourth interest in the adventure, and a loss occurred, the plaintiff brought this action to recover one-half of his proportion of the loss.

The defendant contended that no valid contract was made.

The agreement seems to have been that the defendant was to share "in the result, whether it should prove a profit or a loss."

Rapallo, J., said: "It was not an agreement for the sale

of any personal property or chose in action, but an executory agreement, whereby one party undertook to bear one part of a possible loss, in consideration of a share of an expected profit. The agreement was not within the statute of frauds."¹

Judgment for the plaintiff was affirmed.

§ 129. It seems to be generally held that if one entire contract be void in part it is wholly void.

So held by Savage, C. J., in *Thayer v. Rock*;² so, also, in *Crawford v. Morrell*,³ the court said: "This was part of the same contract, and this last part was void by the statute of frauds; and if part of one entire contract be illegal and void, the whole is void."

But as an entire contract cannot be divided or apportioned, it has been held in some cases that if a part of an order is within the statute and a part is without, the entire transaction is deemed to be within it.⁴

And where a written contract is made for the sale of personalty, including real estate also, it has been held that the contract for the personalty is not necessarily vitiated.⁵

So, if a person performs services under an agreement which is void by the statute of frauds, he may recover for the services.⁶

Trusts in personal property are not within the statute of frauds, and may be established by parol.⁷

§ 130. As it appeared in *Henline v. Hall*,⁸ Henline sold a colt to Hall for \$20. It was at the time agreed that the colt should run with the mare, which was owned by Hen-

¹ *Coleman v. Eyre*, 45 N. Y., 38.
² 13 Wend., 53; *Rice v. Peet*, 15 John., 503.

³ 8 John., 256. See, also, *Hobbs v. Wetherwax*, 38 How., 385; *Burski v. Paige*, 36 N. Y., 537.

⁴ *Cooke v. Tombs*, 2 Anst., 420; *Chater v. Beckett*, 7 T. R., 201; *Thomas v. Williams*, 10 B. & C., 664; *Loomis v. Newall*, 15 Pick., 159.

⁵ *Stansell v. Leavitt*, 51 Mich., 536. See, also, *Smith v. Smith*, 14 Vt., 440; *Abb. Annual Dig.*, 1884, pp. 72, 73; *Mayfield v. Wadsley*, 3 B. & C., 357.

⁶ *Shute v. Dorr*, 5 Wend., 204.

⁷ *Kramer v. McCaughey*, 11 Mo. App. R., 429.

⁸ 4 Ind., 189.

line, until it was weaned, at which time it should be delivered to Hall, who was at that time to pay the price stipulated. When the colt was weaned and before suit brought, Hall tendered the price agreed on, but Henline refused to deliver the colt.

The contract was by parol.

The court, Roache, J., said that by the common law a parol contract for the sale of chattels was valid; that the statute changed the rule only as to contracts exceeding \$50 in value. "The price of the colt being less than that sum, the contract is not affected by the statute of frauds, and is as valid as if it had been reduced to writing."

From the conclusion of the contract until the actual delivery of the colt, the seller, Henline, was a bailee.¹

§ 131. In *King v. Brown*,² where the contract by parol was to convey four acres of land, in consideration of certain work to be done, the contract was declared to be void under the statute of frauds.

Nelson, C. J., on appeal, announced the true principle to be, that the contract being void and incapable of enforcement in a court of law, the party paying the money or rendering the services in pursuance thereof may treat it as a nullity and recover the money or value of the services rendered under the common counts. "This is the universal rule in cases where the contract is void for any cause not illegal, if the defendant be in default, . . . and assuming that the only remedy at law is the value of the services thus rendered under the general counts, it cannot exceed that amount, together with the interest."³

§ 132. In *Case v. St. Catharines Opera House Company*,⁴ it appeared that the plaintiff purchased at the defendant's office six tickets for reserved seats for the performance of

¹ *Willis v. Willis*, 6 Dana, 48; *Wood*, 10 Wend., 142; *Sugd. on Crawford v. Smith*, 7 id., 59. Vend., 219, 222.

² 2 Hill, 485.

⁴ 6 Can. Law T., 309. See, also,

³ See on this point, *Gillet v. Maynard*, 5 Johns., 85; *Gary v. Hull*, 11 Johns., 441; *Dimmock v. Lock-*

Wood v. Leadbitter, 13 M. & W., 838; *Wood v. Lake*, Sayer, 3.

The Mikado, and paid \$6 for them; each ticket had a coupon attached, showing the row and number of the seat, as follows:

Thursday.	OPERA HOUSE, ST. CATHARINES.				Row.....	
	ADMIT ONE.				No	
	H. G. HUNT,	-	-	-	MANAGER.	Parquette.
	Parquette.				Retain	
	Reserved Seat.				this	
					Check.	

The tickets were numbered respectively from twelve to seventeen. The plaintiff with five others went to the opera house at the proper hour, but found that two of the said six seats were occupied; and the manager declining to compel the occupants to give up the seats, the plaintiff with his party left the theater.

This action was for damages for breach of contract. The defendants pleaded the statute of frauds. Senkler, C. J., held that the contract between the parties was simply this: The defendants agreed to allow the plaintiff and his party to enter the theater on the night in question during the performance of the play, and to reserve for his accommodation certain seats; that the agreement *did not amount to a demise or affect any interest in land, but was merely personal*; and did not require to be authenticated by any writing.

Accordingly judgment was given for the plaintiff for damages and costs.

§ 133. The equitable doctrine has uniformly been adhered to, that, as the statute of frauds was designed as a protection against fraud, "it shall never be allowed to be set up as a protection and support of fraud."¹

But where there has been an act of part performance, that will, in equity, avoid the operation of the statute; for, otherwise, it would become an instrument of fraud for designing parties.²

¹ 1 Story's Equity Jurisprudence, § 330.

² 2 Story's Eq. Juris., § 759; Gilb. Lex Pratoria, pp. 239, 240.

The same principle is clearly enunciated in a recent New York case.¹

A contract between brokers, whereby one agrees to purchase and sell stock for the account of the other, to advance money for the purpose and pay assessments on the stock purchased, is not obnoxious to section 26, article 4, of the constitution; and is not required by the statute of frauds to be in writing.²

§ 133*a*. On the subject of part performance it may be said that, to take a case out of the statute of frauds, on the ground of part performance, two things at least are requisite: first, the terms of the contract must be established by proofs which are clear, definite and unequivocal; and second, the acts relied upon as part performance must be exclusively referable to the contract.

On this general question, see note.³

An agreement not to engage in a rival business is not within the statute of frauds.⁴

§ 134. *A third person is not liable for false representations affecting a contract void by the statute of frauds.* Thus take the case of *Rice v. Manley*.⁵ That was an action to recover damages by reason of the failure of one Stebbins to deliver twenty-four thousand pounds of cheese at eleven cents per pound, under a verbal agreement to that effect made with the plaintiff, such failure having been caused by the false representations of the defendant made to said Stebbins. The plaintiff's business was that of buying and shipping cheese from different points in Allegany and Cattaraugus counties, to New York city.

¹ *Sherman v. Scott*, 2 Civ. Pro. R., 369; *Ryan v. Dox*, 34 N. Y., 307, and cases there cited.

² *Kertz v. Fleisher*, 67 Cal., 93.

³ *Cooper v. Carlisle*, 2 C. E. Gr., 525; *Stotsbury v. Vail*, 2 Beas., 246; *Ackerman v. Ackerman*, 9 C. E. Gr., 589; *Smith v. McVeigh*, 3 Stock., 239; *Farr v. Dutcher*, 3 C. E. Gr., 401.

⁴ *Welz v. Rhodius*, 87 Ind., 1. Where so much of a contract as would otherwise be within the statute is executed, the remaining stipulations may be enforced. *Stephenson v. Arnold*, 89 Ind., 426.

⁵ 5 N. Y. S. C. (T. & C.), 15; *Dung v. Parker*, 52 N. Y., 494.

No part of the purchase price was paid, and no cheese delivered; but it was the intention of both parties to carry out the agreement, and it would have been fulfilled but for the interference of defendant.

Manley, the defendant, was present when the contract was made. For the purpose of becoming himself the purchaser, the defendant caused to be sent to Stebbins the following telegram: "If you can sell the cheese do so. I don't care for it." The telegram had the name "E. Rice" signed to it.

Stebbins believing this dispatch to be genuine, and that the plaintiffs did not want the cheese, accepted defendant's offer to purchase it at the same price.

Mullen, P. J., says:

"As we understand the decisions in such cases, they quite uniformly hold, that, whenever the plaintiff is bound to prove a contract to entitle him to recover, and that contract is void by the statute of frauds, neither the *parties to it*, nor any *third person*, can maintain the action. . . . Unless there was a contract between Rice and Stebbins for the sale and purchase of the cheese, Rice could not be damnified by the fraudulent representations of the defendant."

§ 135. The above decision, although seemingly sound, is at variance with the decision in *Benton v. Pratt*.¹ In that case, Seagraves and Wilson verbally agreed to purchase of plaintiff two hundred hogs, and pay him the market price, "provided he delivered them within three or four weeks, and they had not been previously supplied." One Pratt, learning of this agreement, about the time the plaintiffs were in readiness to deliver their hogs to Seagraves and Wilson, offered his two hundred hogs to them, which they at first declined to purchase, on the ground that they had contracted with the plaintiff; but upon being told by a person who attended to Pratt's drove, *in the presence of Pratt*, that the plaintiff was going to Easton with his hogs to fulfill a contract, and after making further inquiries, and

¹ 2 Wend., 385 (A. D. 1827).

not learning of the plaintiff's approach to Allentown, Seagraves and Wilson bought Pratt's drove of hogs. On the following day the plaintiff arrived with his drove, and Seagraves and Wilson declined to buy, having been thus supplied by Pratt. Plaintiff lost the sale of the hogs by reason of Pratt's misrepresentation, and brought this action against Pratt to recover his damages thereby occasioned.

Sutherland, J., after reviewing some of the English and American authorities on this subject, says: "In the case at bar there are no such difficulties" (referring to the case of *Gallagher v. Brunel*,¹ where the action was held not to lie, because the false representation which was alleged to have been made did not amount to an assertion of a fact or facts as existing at the time); "there is the assertion, on the part of the defendant, of an unqualified falsehood, with a fraudulent intent as to a present or existing fact, and a direct, positive and material injury resulting therefrom to the plaintiff. This is sufficient to sustain the action."

We fail to see why this was not a void contract under the statute of frauds, and why the plaintiff should have recovered. There was no memorandum in writing between plaintiff and Seagraves and Wilson, no earnest paid, and no part delivery. It was at most a sale conditioned upon the fact whether at the time mentioned, "within three or four weeks," Seagraves and Wilson should not be "previously supplied." The plaintiff could not have sustained an action against Seagraves and Wilson, and that being so, no action would lie against Pratt.

¹ 6 Cowen, 346.

CHAPTER VI.

CONCERNING GOODS, WARES AND MERCHANDISE — SHARES OF STOCK AS GOODS.

- § 136. Definition of goods, wares and merchandise, in a legal and lexicographical sense.
137. Application of the meaning of goods and chattels.
138. The more modern construction of the words of the statute of frauds.
139. As to shares of stock falling within the statute; variance in the decisions.
140. The first case on the subject in England; *Pickering v. Appleby*; a divided court.
141. An early case in chancery.
142. Shares of stock held not within the statute in England; otherwise in this country.
143. A sale of an interest in an invention not within the statute of frauds.
144. In *Tisdale v. Harris* shares of stock held to be within the statute.
145. Decisions of several states holding in the same way.
146. The same subject continued.
147. Shares of stock, checks, promissory notes, and bonds in certain states held not to be within the statute of frauds.
148. In Indiana it is held, same as in England, that shares of stock are not embraced within the statute; the case of *Vawter v. Griffin*.
149. In Massachusetts shares of stock are decided to be within the statute; *Pray v. Mitchell*.
150. A conditional purchase of stock or subscription for stock held within the statute in *Boardman v. Cutter*.
151. A parol promise to discharge one from a contract of sale of stock which is within the statute is invalid; *North v. Forrest*.
152. Sale of promissory notes held to be within the statute of frauds of Massachusetts.

§ 136. The definition of the words goods, wares and merchandise, as rendered by the lexicographers, has perhaps had some influence upon the courts, as they have often given expression to their meaning.

In his *New World of Words*, published nearly a generation before the English statute of frauds was passed, Mr. Phillips defines the meaning of "merchandise" to be commodities or goods to trade with; and, in effect, the same definition is given in the dictionaries of Kersey, Martin and Bailey.

The *Glossographia Anglicana Nova* says the word "merchandise" came into use as a term to distinguish the *goods* and *wares* exposed to sale in fairs and markets. A similar opinion is expressed in Cowell's *Law Interpreter*, 1708.

"Wares," says Cotgrove's dictionary (1632), is merchandise or merchandise commodity; while Johnson defines *wares* as "commonly something to be sold;" and Webster and Worcester, "goods, commodities, merchandise."

"Goods," in Bailey's dictionary (1732), is said to be merchandise; and in Johnson's, "personal or movable estate, wares;" Worcester, the same, including "chattels, merchandise."

The word "goods," as a technical term of the law, is *nomen generalissimum*, and has an extensive meaning.

Hence, the words "goods, wares and merchandise," lexicographically and in a legal sense, may be said to mean commodities produced or manufactured, and bought and sold in trade and commerce. Text-writers agree that these words comprehend all tangible and corporeal movable property, whether such property be fixed or growing out of the soil or not.¹

§ 137. The words "goods, wares and merchandise" are of large signification. In the more recent decisions they have received a liberal interpretation.²

Under the civil law, *bona* is quite as extensive as personal

¹ Blackburn on Sales, 9, 10; Benjamin on Sales, § 111; Code Napoleon, arts. 516-536; Law Quarterly Rev., January, 1885, p. 11.

² Fine v. Hornsby, 2 Mo. App. R., 61; Boardman v. Cutter, 128

Mass., 388; Riggs v. Magruder, 2 Cranch, C. C., 143; Gooch v. Holmes, 41 Me., 523. Even "accounts" have been adjudged to be *goods*. Walker v. Supple, 54 Ga., 178.

property itself; and at common law, the word merchandise has a comprehensive meaning — *Merx est quicquid vendi potest*. Personal things for which merchants traffic may be called merchandise. The words *goods* and *chattels*, it may be said, cover more than any possible or practicable enumeration. How extensive the meaning of these words is to be understood in any instance, say the cases, must depend upon the subject-matter and the context.¹

In several of the English statutes the word “goods” (*bona* and *biens*) was intended to denote personalty in general, and it is used as synonymous with chattels, debts and credits.²

Some cases have held that “goods and chattels”—the generic denomination of things personal, as used in the statute of frauds of some states—embrace personal property in possession, as well as animate and inanimate property.³

In general, the authorities hold that the word “goods” applies to inanimate, and “chattels” to animate things.

§ 138. The tendency of the more modern authorities and cases has been, not to give to the statute of frauds a narrow or rigid construction, but such a construction as will best accord with the intention of the law-makers, the legislature. This is the golden rule of interpretation.

§ 139. The question whether shares of stock in incorporated companies properly fall within the operation of the statute of frauds has been frequently passed upon by the courts.

In the states of this country, the decisions on the subject are quite variant. This has resulted in part from the fact

¹Gibbs v. Usher, 1 Holmes, C. ³Weston v. McDowell, 20 Mich., C. R., 561; § 3343, subd. 7, of the Code of Civ. Pro. of New York. 357, Graves, J.; sec. 3184, Comp. L. of Michigan; Citizens' Bank v.

²Portman v. Willis, Cro. Eliz., 386; Stat. 13 Edw. 1, ch. 19; 31 Edw. 3; Stat. 22 and 23 Car. 2, ch. 10; 29 Car. 2, ch. 3, § 25; Co. Litt., 118b. Nantucket Steamboat Company, 2 Story R., 52; Baldwin v. Williams, 3 Met., 367; 2 Chitt. Bl. Com., 384, n.

that the language of the statute of frauds of the several states, in many instances, is different.

But in England the law is well established by the leading cases, that shares, stocks, documents of title, choses in action, and other incorporeal rights and property, do not fall within the operation of the statute of frauds. They are deemed choses in action; not "goods, wares and merchandises."¹

§ 140. Probably the first case in England where the question arose as to whether shares of stock of a corporation properly came within the meaning of the statute of frauds as to the sale of "goods," etc., is that of *Pickering v. Appleby*.²

It was an action of *assumpsit* for the value of ten shares in the stock of the Governor and Company of the copper mines in England, sold by the plaintiff to the defendant. There was no memorandum in writing signed, nor any earnest paid. At the trial, King, Ch. J., entertained grave doubts as to the contract falling within the operation of the statute of frauds. It was, therefore, made a *case*, and was argued before the court of common pleas, and afterwards at Sergeant's Inn, before all the judges of England. They were equally divided on the question, six against six.³

§ 141. Mr. Roberts, in his valuable treatise on the Statute of Frauds, observes that the case of *Massell v. Cooke*⁴ came on at Trinity term, in 1720.

¹ *Humble v. Mitchell*, 11 A. & E., 205; *Bowlby v. Bell*, 3 C. B., 284; *Watson v. Spratley*, 10 Exch., 222; *Knight v. Barber*, 16 M. & W., 66; *Bradley v. Holdsworth*, 3 id., 422; *Heseltine v. Siggers*, 1 Exch., 856; *Hibblewhite v. McMorine*, 6 M. & W., 200; *Powell v. Jessop*, 18 C. B., 336. See Statute 32 and 33 Vict., ch. 71, § 15, subd. 5; and *In re Fox*, L. R., 17 Eq., 113.

² Com. Rep., 354.

³ *Colt v. Netterville*, 2 P. Wms.,

307; *Cuddee v. Rutter*, 1 id., 570. The case of *Colt v. Netterville* arose out of the sale of some York Buildings stock. A demurrer was interposed. Whether such stock was embraced within the statute of frauds, the lord chancellor said that the question was too difficult for him to determine upon a demurrer.

⁴ Precedents in Ch., 533; Roberts on Stat. of Fr., 185; Wood on Frauds, 394, n.

This is probably the same case mentioned in *Crull v. Dodson*.¹ In that case the court said it had been determined in chancery that contracts in relation to sales of stock were within the statute of frauds, and without earnest being given were *nuda pacta*.

It may also be presumed that it is the same case referred to by Gray, C. J., in *Somerby v. Buntin*,² in a similar manner.

§ 142. In his work on contracts, published in 1807, Mr. Comyn takes occasion to say that the point does not appear to be finally settled in England, whether shares of a company, or public stock, are comprehended within the words goods, wares and merchandise. But since Mr. Comyn wrote his treatise, it has been well established, by numerous cases in England, that the statute of frauds does not apply to contracts for the sale of stocks, and such is now the law.

On the other hand, by abundant authority in the states of this country, it is well settled that such contracts are within the statute of frauds, and are void without the requisites of the statute being complied with.

As so large an amount of property, in the several states of the country, is invested in corporations, and as the ordinary *indicia* of property arising from delivery and possession cannot take place, there seem to be peculiar and good reasons why shares and stocks of corporations should be embraced under the words "goods, chattels," etc., and why the statute of frauds should apply to them.

§ 143. It was observed by Gray, C. J., in *Somerby v. Buntin*,³ that the words "goods, wares and merchandise" had never been extended by any court beyond securities which are subjects of common sale and barter, and which have a visible and palpable form.

¹ Select Cas. in Chan., 41 & Reg. inson, 5 M. & G., 253; *Doyle v. A.* (1724), fol. 491, in *Ld. Raymond's time*. *Dixon*, 97 Mass., 208; *Browne on the Stat. of Fr.*, 272; *R. S. of the United States*, § 4898.

² 118 Mass., 279.

³ 118 Mass., 279; *Chanter v. Dick-*

He there held that an oral contract to sell an interest in an invention before letters patent are obtained is not within the statute of frauds.

"Before letters patent are obtained," said the court, "the invention exists only in right, and neither that right, nor any evidence of it, has any outward form which is capable of being transferred or delivered *in specie*, or which, upon any construction, however liberal, can be considered as goods, wares or merchandise."

And, accordingly, the court held that the contract set up in the bill was not for the sale of "goods," etc., within the statute of frauds.

§ 144. While the current trend of the decisions in this country is, that contracts for the sale of stocks, shares in corporations, etc., are embraced within the words "goods, wares and merchandise," a difference in the language of the statute of frauds of the several states, as indicated, has occasioned considerable variation in the decisions.

Over half a century ago it was substantially said by Shaw, C. J., in *Tisdale v. Harris*,¹ that by reason of the great increase of incorporations, and the amount of capital invested in them, and as there is as much danger of fraud and perjury in the parol proof of such contracts as in any other, justice and common sense declare that they, too, fall clearly within the mischiefs which the legislature, in enacting the statute of frauds, intended to remedy; that in reason and sound policy they ought to be included.

§ 145. So, in Missouri, in *Fine v. Hornsby*,² which case arose out of the sale of an interest in the Missouri Lime Company, Lewis, J., said that such shares are goods, wares and merchandise, within the purview of the statute of frauds, has been held too long, without an authoritative adverse ruling, to admit of question now.

Likewise, in Connecticut, where, at the time the case of

¹ 20 Pick., 9. See, also, *Colvin v. Ames, J.*; Gen. Stat. of Mass., ch. Williams, 3 Harr. & J., 88; Boardman v. Cutter, 128 Mass., 388, 105, § 5. ² 2 Mo. App. R., 61.

*North v. Forrest*¹ was decided, the statute of frauds contained the words "goods, wares and merchandise," the court, Waite, J., said: This doctrine is supported by the greater weight of authority, and is, that such contracts fall clearly within the mischiefs which the legislature, by the statute, intended to remedy. That there is as much danger of fraud and perjury in the parol proof of such contracts, as in any other; and that the statute ought not to be narrowed by any very rigid construction. By the letter as well as the spirit of the statute of frauds, such contracts fall within it.

§ 146. In California,² where the words of the statute of frauds are goods, chattels or things in action; in Maine,³ where the language is goods, wares or merchandise; in Vermont,⁴ where the words are the same; in Maryland,⁵ where the English statute of frauds exists intact, contracts for the sale of stocks and shares in corporations are held to be within the statute of frauds.

In Florida, also, where the words of the statute of frauds are "personal property," shares of stock are held to fall within the operation of the statute.⁶

§ 147. On the other hand, in Indiana,⁷ where the words of the statute of frauds are "sale of any goods," it is held that neither shares of stock, notes, checks, bonds nor evidences of value are embraced within the statute. In New Hampshire, where the words "goods, wares or merchandise" are used in the statute of frauds, promissory notes are held not to fall within its operation.⁸

¹ 15 Conn., 400 (1843). The statute of Connecticut as amended in 1875 reads "personal property."

² *Mayer v. Child*, 47 Cal., 142 (1873), an action arising out of the sale of mining stock.

³ *Pray v. Mitchell*, 60 Me., 430.

⁴ *Fay v. Wheeler*, 44 Vt., 292.

⁵ *Colvin v. Williams*, 3 Harr. & J., 38.

⁶ *Southern Life Insurance and Trust Company v. Cole*, 4 Fla., 359, 378; *Gadsden v. Lauer*, 1 McMullin, 87.

⁷ *Vawter v. Griffin*, 40 Ind., 602 (1872).

⁸ *Whittemore v. Gibbs*, 24 N. H., 484. See *Burke v. Partridge*, 58 id., 353, as to sale of a patent right.

In an early case, in Georgia, treasury checks were held without the statute of frauds.¹

And in Alabama a contract for the sale of promissory notes, exceeding \$200 in amount, is required to be in writing to be binding.²

In *Brownson v. Chapman*,³ where contracts of purchase of shares of stock were made by the defendants to fill certain orders, and being by parol they were declared to be void under the statute of frauds of New York, where the words of the statute are "goods, chattels or things in action."

§ 148. In *Vawter v. Griffin*,⁴ Buskirk, J., held that the word "*goods*," used in the statute of frauds of Indiana, embraces the words wares and merchandise; that the legal effect of the English and Indiana statute is the same; and that the court might very properly adopt and be governed by the construction which has been placed upon the seventeenth section by the English courts, and hold that contracts for the sale of shares or stocks, notes, checks, bonds and evidences of value *are not within that section*. He cites some of the earlier and later English cases.⁵ The learned judge thought that if it had been intended by the law-makers to embrace choses in action, and evidences of debt also, the words *personal property* would have been employed. It will be seen, however, that in Massachusetts, and some other states, where the words "goods, wares and merchandise" are used in the statute of frauds, it has been uniformly

¹ *Beers v. Crowell*, 1 Dudley, 28.

² *Hudson v. Wier*, 29 Ala., 294; but see *Baldwin v. Williams*, 3 Met., 365; *Gooch v. Holmes*, 4 Me., 523; *Riggs v. Magruder*, 2 Cranch, C. C., 143.

³ 63 N. Y., 625. See *Baltzen v. Nicolay*, 53 N. Y., 467; *Coleman v. Eyre*, 45 N. Y., 39; *Mason v. Decker*, 72 N. Y., 595; *Porter v. Wormser*, 94 N. Y., 431. Where a vendor

agrees to take back the stock sold, the statute does not affect. *Fitzpatrick v. Woodruff*, 96 N. Y., 561 (1884); *Thorndike v. Locke*, 98 Mass., 340 (1867).

⁴ 40 Ind., 600.

⁵ *Duncroft v. Albrecht*, 12 Sim., 189; *Chanter v. Dickinson*, 5 Man. & Gr., 253; *Pawle v. Gunn*, 4 Bing. N. C., 445.

held, and the law is well established, that shares of stock fall directly within the statute.

§ 149. Thus, Walton, J., in *Pray v. Mitchell*,¹ referring to the case of *Tisdale v. Harris*,² with approval, said: "Now, if we assume that this was not a contract or agreement to become a member of the firm, but a contract with the defendant alone, to purchase a share of his individual interest in the capital stock of the company, must it not, in the absence of delivery which was impossible, and in the absence of earnest or part payment, which is not claimed, be proved by some note or memorandum in writing, signed by the party to be charged or by his agent? Clearly so."

While it seems in consonance with common sense, and has been established by the weight of authority in several states, that stocks in corporations should be and are deemed goods, wares and merchandise, it is equally well settled that the statute of frauds does not extend to securities which are not subjects of common sale and barter.

§ 150. In *Boardman v. Cutter*,³ the defendant, as an inducement to the plaintiff to subscribe \$1,000 to the capital stock of a corporation which was about to be formed, assured him that he would purchase the shares at cost, less the interest, at any time the plaintiff should desire to sell them.

The plaintiff subscribed and paid for the shares, and within six months afterwards offered to transfer the stock to the defendant, and demanded of him the fulfillment of his agreement, which he refused. The court below ruled that the agreement was valid in law; that the signing of the agreement to form the corporation by the plaintiff, and the taking the shares of stock by him, was by reason of the agreement between the parties, and that the plaintiff was entitled to recover the par value of the ten shares, whatever their market value might be, with interest from the time of the demand.

To these instructions and rulings the defendant excepted.

¹ 60 Me., 430.

and Stockholders, § 333. See, also,

² 20 Pick., 13.

Mayer v. Child, 47 Cal., 142.

³ 128 Mass., 388; *Cook on Stock*

Upon the appeal, Ames, J., said: "It has been decided by this court that shares in a corporation are 'goods, wares or merchandise' within the statute of frauds.¹

"There is some conflict in the decisions of other courts upon this point,² but we do not feel called upon to overrule the two decisions above cited. As the defendant's contract in this case was not in writing, we see no ground upon which any action can be maintained upon it, without violating the statute of frauds."

And he further substantially said, that the fact that the plaintiff was induced to become one of the stockholders by the defendant's promise that he would at some future time buy the stock of him at a specific price did not change the essential character of the transaction.

§ 151. The principal question presented in *North v. Forrest*,³ which was an action in *assumpsit*, was whether a discharge from a contract, for the sale of shares of stock in a joint stock corporation, which is within the statute of frauds, is a sufficient consideration for a parol promise, by the releasee, to pay a sum of money. The court held it was not.

The defendant agreed to sell, and the plaintiff agreed to purchase of him, certain shares in a corporation for \$3,000, to be paid by the plaintiff, on the transfer of the shares to him, which transfer was to be made *within a reasonable time*.

Two weeks *afterwards*, in consideration of the plaintiff agreeing to discharge the defendant from the performance of this agreement, the defendant promised to pay him \$150, when requested; and also to pay him one-half of the excess of such sum as he should sell his, the defendant's, interest in said stock for, over and above the sum of \$3,000, when the defendant should be requested by the plaintiff. A month later the defendant sold his interest for \$3,200;

¹*Tisdale v. Harris*, 20 Pick., 9; 230; *Knight v. Barber*, 16 M. & Baldwin v. Williams, 3 Met., 365. W., 66.

²*Somerby v. Buntin*, 118 Mass., 279; *Peabody v. Speyers*, 56 N. Y., 315 Conn., 400 (1843). The statute of frauds of Connecticut was amended in 1875.

and it was claimed that the defendant became liable to the plaintiff thereby in the sum of \$100. Waite, J., held that the contract for the sale of the stock, by the terms of the statute, had no validity in law. To make a parol promise obligatory upon a party, it must be made upon a sufficient consideration.¹ A moral obligation has been holden a sufficient consideration to support an express promise, where there has been an antecedent liability, which has been removed by some subsequent event or proceedings, and a subsequent promise to pay may be enforced. That principle did not apply in this case. Upon the question of part performance of the contract, by the sale of the stock, the court observed: "The defendant has, indeed, sold the stock; but this he could have done as well without any contract with the plaintiff as with it. The contract was invalid."

Judgment was directed for the defendant.

§ 152. In *Baldwin v. Williams*,² the question was whether, on the sale of promissory notes, the contract was required to be proved by some written memorandum.

Wilde, J., thought that such contracts were within the mischief the statute intended to prevent, and that the words *goods* and *merchandise* were sufficiently comprehensive to embrace promissory notes.

The word *chattels* is not used in the statute of frauds of Massachusetts, but the court held that "personal chattels are movable *goods*," and, so far as these words may relate to the questions under consideration, *they seem to have the same meaning*.

And Grover, J., in *Peabody v. Speyers*,³ observes that a contract for the sale of gold to an amount exceeding fifty dollars is equally within the statute of frauds as that for the sale of any other personal property. When the subject of such a contract, it is regarded, not as money, but as a commodity; and the contract must be made in compliance with the statute of frauds, or it will be void.

¹ *Cook v. Bradley*, 7 Conn., 62.

³ 56 N. Y., 230, 234.

² 3 Met. (Mass.), 367.

CHAPTER VII.

OF SALES OF GROWING CROPS.

- § 153. Distinctions in sales of crops; *fructus industriales* and *fructus naturales*.
- 154. Rule of construction in sales of growing crops.
- 155. Contract to deliver a chattel not affected by the statute, although to remain in the soil for a time.
- 156. Example, the case of *Whipple v. Foot*.
- 157. Difficulty of applying the rule in certain cases.
- 158. Crops which grow spontaneously, and by industry of the owner.
- 159. Hops produced by annual cultivation are deemed goods and are within the statute of frauds; *Frank v. Harrington*.
- 160. Another illustration; as to corn and potatoes.
- 161. As to a sale of hops maturing on the vines.
- 162. The rule in California as to growing crops; *Goodyear v. Walliston*.
- 163. Another illustration; *Davis v. McFarlane*.
- 164. Growing crops held not to fall within the statute of frauds.
- 165. The rule in Indiana as to growing crops as affected by the statute of frauds; *Bricker v. Hughes*.
- 166. Illustration; growing corn can be delivered.
- 167. Of contracts for the sale of such barley as should be raised on farms.
- 168. Rule in New Hampshire; if the contract is substantially for the goods it is within the statute; the case of *Pitkin v. Noyes*.
- 169. Rule in England; contract for the potatoes a given quantity of land should produce.
- 170. Another illustration; *Parker v. Staniland*.
- 171. Contract for the sale of a field of grass; under the fourth section; the case of *Crosby v. Wadsworth*.
- 172. Rule in Wisconsin as to contracts for the sale of growing grass; *Wescott v. Delano*.
- 173. Growing grass not goods.
- 174. Grass already grown may be sold by parol; *Cutler v. Pope*.
- 175. Rule of construction of contracts for the sale of fruit; how far chattels.
- 176. Rule adopted in Maryland as to growing fruit; the case of *Purner v. Piercy*.
- 177. Certain deductions.

§ 153. As deducible from the English and American cases, two distinctions are drawn in regard to sales of anything attached to the soil. First, where, by the contract, the property attached to the soil is to be transferred to the vendee by the owner *after* severance; and second, where, by the contract, the property is to be transferred to the vendee by the owner *before* severance from the soil.

In general, contracts arising under the former class, although resting in parol, are valid under the statute of frauds; while contracts arising under the latter class are void unless evidenced by writing. In other words, growing crops, if *fructus industriales*, are chattels; and whether mature or immature, whether before or after severance, a contract of sale of them is a contract for the sale of chattels.

On the other hand, growing crops coming under the general denomination *fructus naturales*, while they are deemed a part of the soil before severance, if they are not to vest in the purchaser until after severance from the soil, a contract in regard to them is executory and is for the sale of goods or chattels.

§ 154. Before the statute of frauds, growing crops were almost uniformly adjudged to be goods. The statute wrought no change in the law in this regard; it simply provided for goods according as they were previously esteemed. A safe rule, therefore, would seem to be, that if, before the statute, certain kinds of growing crops were held to be goods and chattels, then a parol contract will be sufficient.

Mr. Justice Blackburn has said that growing crops are *chattels*, but they are not *goods*, and that larceny could not be committed on them at common law. He further says: "Things attached to the soil are not goods, though when severed from it they are; thus, growing trees are part of the land, but the cut logs are goods; and so, too, bricks or stones which are goods, cease to be so when built into a wall,—they then become a part of the soil. . . . It seems

pretty plain upon principle that an agreement to transfer the property in something that is attached to the soil at the time of the agreement, but *which is to be severed from the soil and converted into goods before the property is to be transferred, is an agreement for the sale of goods within the meaning of the 9th Geo. 4, ch. 14, if not of the 29th Car. 2, ch. 3.* "And when the agreement is that the property is to be transferred before the thing is severed, it seems clear enough that it is *not* a contract for the sale of goods; it is a contract for a sale, but the thing to be sold is not goods."¹ Hence, it follows, that, if the contract be for the sale of the thing after it has been severed from the land, so as to become the subject of larceny at common law, it is a contract for the sale of *goods*, etc., within the statute of frauds.

§ 155. In his valuable treatise on the statute of frauds, Mr. Browne deduces the following rule from the English cases: "If the contract, when executed, is to convey to the purchaser a mere chattel, though it may be in the *interim* a part of the realty, it is not affected by the statute; but if the contract is, in the *interim*, to confer upon the purchaser 'an exclusive right to the land for a time, for the purpose of making a profit of the growing surface,' it is affected by the statute, and must be in writing, although the purchaser is, at the last, to take from the land only a chattel."²

Although this is said in reference to the fourth section of the English statute of frauds, which does not exempt leases for a year and less from its operation, it has some application here.

It has been held, however, that where leases for a year and less are excepted from the operation of the statute of frauds, a contract for the sale of growing crops,—the products of periodical cultivation, is not affected by the statute,

¹ 1 Blackburn on Sales, 9; 4 Kent's 365; Watts v. Friend, 10 B. & C., 446.

Com., 5th ed., 450; Dunne v. Ferguson, 1 Hayes (Irish) R., 542; Stephen's N. P., 1971; Benjamin on Sales, 118; Parker v. Staniland, 11 East,

² Browne on the Stat. of Frauds, § 000.

although it may confer upon the purchaser an exclusive right to *the land* while the crop is ripening and being harvested.

§ 156. If the subject of the contract be produced by the manurance and industry of man, "in sowing and reaping, planting and gathering," such, for instance, as crops of grain, cotton, potatoes and vegetables, or such as may be properly denominated *fructus industriales*, it is deemed goods and chattels; but otherwise where it is the natural production of the earth, *fructus naturales*, such as *fruit* on trees, grass, timber, and the like.¹ Some cases have drawn the distinction between products which go to the executor, and products which go to the heir; the former in contemplation of law are deemed chattels, the latter interests in land.

These general distinctions existed before the statute of frauds was passed, and ever since have received recognition by the courts.²

For instance, take the early case of *Whipple v. Foot*.³ There it was held that wheat, growing, is a chattel, and may be sold as such on execution. In such a case, also, the purchaser is entitled to the right of ingress and egress to gather the crop.⁴ On this last question, however, the English decisions are not altogether consistent.⁵

The purchaser of growing grain, under such executions, acquires the right of leaving the grain upon the soil until its maturity, and also the right of entering upon the land to gather and carry away the crop.⁶

¹ *Bernal v. Hovious*, 17 Cal., 541; 248; *Graves v. Weld*, 5 Barn. & A., *Vischer v. Webster*, 13 id., 58; 105; *Walker v. Sherman*, 20 Wend., *Westbrook v. Eager*, 16 N. J., 81; 638; *Bostwick v. Leach*, 3 Day Benjamin on Sales, 120; *Evans v. (Conn.)*, 484. Roberts, 5 B. & C., 836.

⁴ *Stewart v. Doughty*, 9 Johns.,

² *Williams on Executors*, 596; 112. *Delaney v. Root*, 99 Mass., 546.

⁵ *Crosby v. Wadsworth*, 6 East,

³ 2 Johns., 422; *Peacock v. Purvis*, 2 Brod. & B., 362. See, also, *Carrington v. Roots*, 2 Mees. & W.,

611; *Parker v. Staniland*, 11 id., 363.

⁶ *Bloom v. Welsh*, 27 N. J., 177.

§ 157. The conflict of opinion as to whether certain kinds of growing crops are comprehended under the term *fructus industriales*, or *fructus naturales*, has arisen in part from the fact that some products of the soil are not annual, as emblements, nor permanent, as grass or trees, and do not yield a crop until the second or third year, or yield successive crops for a term of years before being exhausted,—such as clover, madder, teasle, and the like.¹ The authorities, although meagre on the subject, seem to hold, and Lord Denman in an important case,² in effect, held, that the crop of the first year, in such cases, would be *fructus industriales*, but that crops of subsequent years, “like fruit on trees planted by tenants, would be *fructus naturales*, unless requiring cultivation, labor and expense for each successive crop, as hops do, in which case they would be *fructus industriales*, until exhausted.”

As far as the cases have gone on this subject, applicable to the statute of frauds, the law seems to be quite well settled.

A review of the authorities and cases, however, will be found useful and interesting.

§ 158. It appears to have been decided at an early period in England and in this country, that, if the subject grows spontaneously, without cultivation, it is to be deemed a part of the *realty*.

On the other hand, some well-considered authorities, since the early case of *Latham v. Atwood*,³ have held that such things as grow by manurance and industry of the owner, and which depend upon his labor and cultivation and go to enhance the personal estate, are *personal* chattels, and within the statute of frauds.

Hence, in the above case, it was directly held that “hops” are personal property; and the reason there given is said, by an able judge, to be “very satisfactory.” In another early case it was held that hops growing out of old

¹ Benjamin on Sales, 128, 130.

³ Croke Charles, 515; but see Em-

² Graves v. Weld, 5 B. & Ad., 105. merson v. Heelis, 2 Taunt., 38.

roots shall go to the executor or administrator, because they grow by the manurance and industry of the owner, and so are emblements.¹

In *Bishop v. Bishop*,² the majority of the court were of opinion that the root of hop is perennial, continuing for a series of years, and would pass to the purchaser of the real estate.

§ 159. In *Frank v. Harrington*,³ the plaintiff entered into a parol contract with the defendant, for the purchase of his crop of hops, of about seven thousand pounds, then growing and maturing on the defendant's land, for the price of thirteen cents per pound. The plaintiff paid \$1 down, and was to pay the balance when the hops were delivered at the defendant's kiln and accepted by the plaintiff.

The defendant refused to deliver the hops and the plaintiff brought his action for damages. He was nonsuited, on the ground that the contract was void; the court holding that the subject of the contract was real estate. The plaintiff excepted and appealed.

The court, at general term, after referring to the Revised Statutes,⁴ as to what shall be deemed assets, viz., "crops growing on the land of the deceased at the time of his death," and "any kind of produce raised *annually by labor and cultivation*, except grass growing, or fruit not gathered," said that, the statute being silent as to hops, he would decide the question in the case upon authority independent of the statute.

"As the value of the hop depends so essentially upon manurance and annual cultivation," said Morgan, J., "there is no reason why it should be taken out of the category of 'produce raised annually by labor and cultivation,' by any new interpretation of the statute of frauds." And he concludes that hops growing and maturing on the vines, which are produced by *annual cultivation* and the in-

¹ *Fisher v. Forbes*, referred to in 9 Viner, 373, pl. 82; 3 Bacon's Ab., tit. Ex'rs and Adm'rs (H.), p. 493.

² 11 N. Y., 124, Gardner, C. J.

³ 36 Barb. (N. Y.) R., 417.

⁴ 2 R. S., 83, §§ 5, 6.

dustry of the owner, are personal chattels, within the meaning of the statute, and as such subject to sale like other personal property. A new trial was granted.

§ 160. In *Rodwell v. Phillips*,¹ it was decided that hops are *fructus industriales*; and referring to *Waddington v. Bristow*,² where it was held that an agreement for the purchase of growing crops is not an agreement for the sale of goods, wares and merchandise, Park, B., said, "that case would now probably be decided differently."

In *Jones v. Flint*,³ it was held that corn and potatoes were goods and chattels within the meaning of the statute of frauds; that they are *fructus industriales*.

So *Littledale, J.*, in *Evans v. Roberts*,⁴ held that any growing produce of the earth reared by labor and expense, in actual existence at the time of the contract, whether it be in a state of maturity or not, is not to be considered as a sale of an interest in or concerning land.

And *Bayley, J.*, said it was a contract for the sale of *goods*.

§ 161. In *Waddington v. Bristow*,⁵ the question was whether the contract for the sale of all the hops that should grow upon twenty-two acres of land, to be delivered in pockets at a certain place, fell within the seventeenth section and was thus exempted from the stamp act, 23 Geo. 3, ch. 58, § 1.

Although this case was held to be within the stamp act, it would seem that, upon the principle of the decisions in some earlier cases, it would not, because it was a contract incapable of being executed at the time when it was made.

While the opinion of the court was unanimous in holding that the case did not fall within the exemption, the judges gave different reasons for their judgment. Some of them holding that it was an agreement for the sale of goods,

¹ 9 M. & W., 503.

² 2 B. & P., 452.

³ 10 Ad. & El., 753.

⁴ 5 B. & C., 837.

⁵ 2 Bos. & Pul., 452; *Warwick v. Bruce*, 2 M. & S., 205; *Teal v. Auty*, 2 Brod. & Bing., 99.

and something more; others, that at the time the hops did not exist in the state of goods; that it was a speculative bargain; and that the vendee had an interest in the whole produce of that part of the vendor's farm which consisted of hop-grounds; and that the contract might fall within the exemption of the act, notwithstanding the hops were not in the state of goods at the time of the making of the contract.

The reasons given by Morgan, J., in *Frank v. Harrington*,¹ why hops maturing on the vines should fall within the operation of the statute as to the sale of goods, etc., seem very satisfactory.

§ 162. In California, by a long line of decisions, it is held that contracts for the sale of growing crops, *fructus industriales*, the product of periodical planting and cultivation, are valid, although not evidenced by a memorandum in writing.

*Goodyear v. Walliston*² was an action to recover possession of a certain amount of hay, wheat and barley. Goodyear was owner of a tract of land in Solano county. He made a contract with one McGrane, whereby McGrane was to enter upon the tract, and cultivate as much as he could, and cut hay on the balance, Goodyear furnishing the money necessary; in consideration whereof one-fourth of the crop was to be reserved for and go to Goodyear; the rest was to be taken by Goodyear and disposed of, and after deducting from the proceeds the amount of the advances made and the indebtedness due him, he was to pay the balance to McGrane. McGrane planted wheat and barley, which he cut and stacked in July, and sold the same, including the hay, to Goodyear, who took possession and was in possession of the grain and hay when the defendants seized the same. It appeared that prior to the crop being gathered, McGrane gave his note for \$1,500 to Walliston,

¹ 36 Barb., 417.

id., 661; *Stevens v. Stewart*, 3 id.,

² 42 Cal., 11; *Bernal v. Hovious*, 141.

17 id., 541; *Bours v. Webster*, 6

the defendant, to secure which he executed a mortgage upon his growing crops. The mortgage was recorded. McGrane confessed judgment in favor of the defendant, August 15, and under that judgment, about three weeks after the grain had been stacked, Sheriff Hobbs, under an execution, seized the property in question.

Judgment was given in favor of the plaintiff.

Sprague, J., upon the appeal, said: "The defendant Hobbs was clearly a trespasser, upon the facts as found; as no portion of the property was at the time subject to execution as the property of McGrane; and Walliston, in directing the levy, was a joint trespasser with him as to all the property except the wheat and barley." He held that the sale to the plaintiff was made in good faith, and for a valuable consideration; that the mortgagee did not claim to have taken, or attempted to take, possession, until the plaintiff had been "in the actual possession five days," and that the plaintiff, as purchaser, took the grain relieved of the defendant Walliston's mortgage lien.

The judgment was affirmed.

That the title to the growing crop, as it was grown, vested in Goodyear, who was entitled to retain one-fourth to his own use, was concurred in by Rhodes, C. J., and Crockett, J.

§ 163. The case of *Davis v. McFarlane*¹ is interesting and important.

It was an action for the conversion of three thousand bushels of wheat.

One Bowen plowed and sowed in wheat about two hundred and forty acres of the public lands of the United States. The lands were uninclosed.

By a verbal contract, Bowen sold the growing crop at the price of \$2.25 per acre. Twenty dollars was paid down; another payment was to be made on April 1st, and the rest when the crop should be harvested. Bowen did not live on the premises, which was fifteen miles distant, nor was any

¹ 37 Cal., 634.

one in actual possession of the land; he did not go to the crop and deliver possession at the time of the sale, but said to the plaintiff, "you will either have to go out there, or keep a man to take care of it." The plaintiff agreed, as part of the contract, to guard the crop from cattle, at his own risk, and cut and harvest it at his own expense.

Several days after the sale, the plaintiff went and examined the crop; no person was there, nor was there any indication that any person had been there for a long time.

The plaintiff remained on the place two nights and three days, continuously, at that time.

On April 1st, when the remainder of the first payment of \$200 was to be made, according to contract, the same was tendered to Bowen, who refused to accept it, on the ground that he had sold the crop to another person.

It appeared in the case that the plaintiff had united with other owners of crops in the vicinity, in contributing moneys to pay the expense of keeping cattle from the crops,—the cultivated fields in the neighborhood being generally uninclosed.

From the 1st of April, the person so employed protected the crop from incursions of cattle down to July 1st. During that period the plaintiff frequently visited the place and looked after the crop.

It further appeared that Bowen, on March 25th, nine days after his sale to the plaintiff, gave a bill of sale to the defendant of all his right to the land and crop, for \$818, of which \$50 was paid at the time.

When this second sale was made Bowen was four miles from the premises.

The defendant at the time was ignorant of the sale made to the plaintiff, but knew of the fact before making any further payment.

After the sale, one Tifton, at the request of Bowen, went with the defendant to the premises and put him in possession, there being no one there at the time.

The defendant refused to contribute anything toward protecting the crop from incursions of cattle.

From the time the defendant took possession, much controversy continued between the plaintiff and himself. When the crop had matured, the defendant, against the protest of the plaintiff, harvested the crop, which yielded three thousand bushels, valued at \$3,000.

The plaintiff recovered a judgment.

The defendant appealed.

The appellant made two principal points:

“*First*. That the sale to the plaintiff was of an interest in land, within the meaning of the sixth section of the statute of frauds, and, therefore, void because not in writing.

“*Second*. If the sale was of chattels, there was no immediate delivery, followed by an actual and continued change of possession, within the meaning of the fifteenth section of the statute, and the sale was therefore void as against the defendant, who is a subsequent purchaser in good faith.”

In declining to sustain either of these points, the court, Sanderson, J., said: “Contracts for the sale of growing periodical crops — *fructus industriales* — are not within the statute of frauds, and *therefore need not be made in writing*. After some vacillation this has become the settled doctrine.”

Nor is this rule, said the court, affected by the circumstance that the purchaser is to have possession of the land for the purpose of raising the crop and harvesting it when matured.

“A growing crop,” said the court, “*while growing and until ready for the harvest*, is, also, unaffected by the fifteenth section of the statute in relation to the sale of goods and chattels *in the possession and under the control* of the vendor. A growing crop, until ready for the harvest, cannot, *by itself*, become the object of a delivery, and can only be delivered into the possession of the vendee by delivering to him the possession of the land also, of which it is a part.

"We do not consider that chattels thus situated fall within the rule prescribed by the statute in relation to the immediate delivery and actual and continued change of possession of goods and chattels in the possession and under the control of the vendor, at least until nature has prepared them for delivery to the reaper."

In this connection, the learned justice very sensibly observes that, to so construe the statute, would make it an absolute interdiction upon the sale of growing crops, unless the vendor is willing to abandon the possession of his farm to the vendee at the same time.

The judgment and order were affirmed.

The above case presents so many points of interest, it has been deemed desirable to give the facts and law of the case at considerable length.

§ 164. Marshall v. Ferguson¹ was an action to recover \$650 for barley and wheat alleged to have been sold by the plaintiff to the defendant.

The contract was for the growing crop of those grains, then growing on lands in the possession of several persons. After the contract was made, the defendant resold the same to the parties in possession of the land, and had received his pay from all of them, except one.

The agreement of defendant was to pay the above mentioned sum in grain, at the market price, at a specified time, but he failed to deliver the grain.

Crocker, J., said that the crops contracted for were *the product of periodical planting and cultivation*, and the law appeared to be well settled, both in the English and American courts, that *sales of growing crops of that kind do not fall within the provision of the statute of frauds relating to sales of an interest in real estate, and, therefore, such sales, though not in writing, are valid.*

It was held in a Wisconsin case, in an action on a contract

¹ 23 Cal., 651; Smith v. Bryan, 5 Buffington v. Curtis, 15 Mass., 528; Maryland, 140; Safford v. Annis, 7 Browne on Stat. of Fr., 250-258, Me., 168; Joy v. Sears, 9 Pick., 4;

for the sale of a crop of tobacco, not yet raised, that the title remains in the vendor until actual delivery, and that the purchaser may refuse to accept when the tobacco is delivered.¹

§ 165. In Indiana, where the statute of frauds reads "no contract for the sale of any goods," the decisions seem to have uniformly held, since *Northern v. The State*,² that growing crops, raised annually by labor, are the subject of sale as personal property, before maturity, and that their sale does not necessarily involve an interest in the realty requiring a written agreement.

This view fairly accords with many well considered cases in England and in this country.

In *Bricker v. Hughes*,³ one Guffy, after making several attempts to sell certain corn still standing in the field, sold it to the defendant Hughes. It was bought as "eight hundred bushels, more or less." Something was paid at the time, and Guffy subsequently delivered about seventy bushels to Hughes.

In the case there was evidence tending to show that the plaintiff, after the alleged purchase, told the defendant that he had an account against Guffy, and that the defendant virtually agreed that if he got "the full quantity, eight hundred bushels," there would be something going to Guffy over his own account against him, and he would "save Bricker's account out of it." And also, that Guffy had made a written contract with the plaintiff to sell to him the corn, and that under that contract Guffy had directed his employee, Chambers, "to gather the corn, and deliver it in said crib for Bricker," which was done. Bricker paid for the corn in a bill for medical services, and Guffy paid for gathering the corn."

The corn was hauled to a crib, belonging to the defend-

¹ *Olson v. Mayer*, 56 Wis., 551; ² 1 Ind., 113 (1848).
Baker v. Henderson, 24 id., 509. ³ 4 Ind., 146; *Sherry v. Picken*, 10
See *McIlvane v. Harris*, 20 Mo., id., 375; *Austin v. Sawyer*, 9
457; 64 Am. Dec., 496. *Cowen*, 39.

ant, on the Wabash river; the defendant's clerk having given Bricker permission thus to occupy it, without knowing at the time what corn it was that was to be placed in it. About six hundred and fifty bushels were put in the crib.

Hughes, finding the corn in his crib, took it on a boat "down the river," and sold it.

It was contended, on the appeal, that no property passed to Hughes.

The court, after reviewing the character of the contract, and the circumstances connected with it, said, "as Bricker bought afterwards with full knowledge of said sale, he has no pretense on which to claim the corn."

The judgment of the court below in favor of the defendant was affirmed.

§ 166. *Weatherby v. Higgins*¹ was in *assumpsit* for a breach of contract for the sale of hogs and corn.

Several instructions were tendered to the court below by the plaintiff; in effect that the jury cannot find the amount of earnest money paid; that corn growing in the field is not susceptible of delivery.

The court, Hovey, J., held these instructions to have been correctly refused. He said: "Growing corn can be as easily delivered as any other article of commerce."

The decisions in Indiana are in direct accord with the adjudications of California and some other states.

§ 167. In *Van Sickles v. Nester*,² the plaintiff, in the spring of 1880, contracted to sell and deliver to the defendant all the barley that he should raise during the season

¹ 6 Ind., 74. See, also, *Matlock v. Fry*, 15 id., 483; *Miller v. State*, 39 id., 267; *Britain v. McKay*, 1 Ired., 265; *Ross v. Welch*, 11 Gray, 235; *Moreland v. Myall*, 14 Bush, 474.

² 34 Hun, 65. In *Austin v. Sawyer*, 8 Cow., 39, Kent, Ch. J., held that wheat growing is a mere chattel and the property in it passes by

parol without writing, and that an action of trespass *quare clausum fregit* for the loss of the crop would lie. "The general language of the authorities," he says, "is to this effect, that the grantee *restauræ terræ*, or *herbugii terræ*, may maintain trespass, though he has not the soil."

upon the two farms, one at Geneva, the other at Shortsville, excepting such as should be necessarily reserved for seed, and that he should "plant eighty acres." The price to be paid was seventy-five cents per bushel.

The Geneva farm was worked by one Wright, under a contract that he should have one-half of the crops raised thereon. He sold and delivered his part of the barley to other persons.

The defendant refused to pay the balance claimed to be due by the plaintiff, on the ground that only one-half of the barley raised upon the Geneva farm had been delivered to him, and he was entitled to the other half.

The defendant refused to receive other barley tendered by the plaintiff. In this, says the court, he was "guilty of a breach of the contract, and this breach dispensed with the necessity of the plaintiff's offering to deliver the rest." . . . "If the barley was not of the quality required by the contract, then he had a right to refuse to accept." The jury found for the plaintiff.

The judgment was affirmed.

§ 168. In *Pitkin v. Noyes*,¹ the defendant agreed to raise three acres of potatoes, and deliver them to the plaintiffs for twenty cents a bushel. Whether it was agreed that the contract should include the crop of 1864, as well as that of 1863, the evidence was conflicting. The defendant, in 1863, raised three acres of potatoes and delivered a part of them to the plaintiffs before any question arose as to the price. The plaintiffs claimed that the contract was not binding because it was not in writing, and offered to pay eighteen cents a bushel; that they agreed to pay twenty cents a bushel if the defendant would raise three acres of potatoes in 1864 and deliver them at plaintiffs' mill at that price; that defendant accepted said offer; that twenty cents a bushel was paid in 1863, and that the bargain for 1864 was concluded January 30, 1864.

The defendant excepted to certain instructions; the jury

¹ 48 N. H., 294.

disagreed, and, on motion, the court reserved the case for the purpose of determining questions which would arise at another trial. The main point was, whether this was a contract for work, labor and materials, or a contract of sale of potatoes. If the former, it was not within the statute of frauds; if the latter, it was. The distinctions are very nice in such cases. "Upon the whole," says Bellows, J., "we are satisfied that if the contract be substantially for the goods, it is within the statute, whether they are then manufactured or not; but it is otherwise if the contract be to manufacture and deliver the goods, that is, if the labor and skill of the seller is stipulated for and makes part of the contract.

It is obvious that the labor and skill of a workman may be bargained for in this way as well as in any other,—the compensation being in the price of the article he makes; and the only question in this particular case is whether the skill and labor of the workman was especially contracted for so that the employer was entitled to that, and could be obliged to take no other."

The court held that, as the question was a mixed one of law and fact, it would be proper to leave it to the jury, to find whether the contract was essentially for the work and labor and materials of the defendant in raising the potatoes, so that he was bound himself to raise them, or whether it was substantially a sale of potatoes, which he might raise himself, or procure by purchase or otherwise. If it was the former, it would *not* be within the statute of frauds; but if the latter it *would* be.¹

On the other question presented in the case, as to the consideration for the defendant's agreement, the court say, if the plaintiff agrees to take and pay for the crop of potatoes at the price fixed, that would be a sufficient consideration, as also would the compromise of doubtful and conflicting claims be to uphold an agreement.²

¹Lamb v. Crafts, 12 Met., 353; ²Barlow v. Ocean Ins. Co., 4 Browne on Statute of Frauds, § 308; Met., 270; Tuttle v. Tuttle, 12 Met., Cason v. Cheely, 6 Ga., 554. 551; Gates v. Shatts, 7 Mich., 127;

§ 169. In *Evans v. Roberts*,¹ the plaintiff agreed to sell and the defendant agreed to buy of him "a cover of potatoes then in the ground," the plaintiff agreeing to dig and deliver the potatoes at a stated price; the defendant, at the time, paying "one shilling earnest."

The action was brought in *assumpsit* "for crops of potatoes bargained and sold;" and the defendant contended that the contract was for the sale of an interest in land, and being verbal was accordingly void. As was evidenced in the case, the vendor was to raise the potatoes from the ground at the request of the vendee.

"The effect of the contract," said the learned Bayley, J., "was to give to the buyer a right to all the potatoes *which a given quantity of land should produce*, but not to give him any right to the possession of the land; he was merely to have the potatoes delivered to him when their growth was complete."

Accordingly, the court decided that the contract was simply for the "sale or delivery of things which, at the time of the delivery, should be goods and chattels."

§ 170. The case of *Parker v. Staniland*² is interesting. There potatoes, mature in the ground, were sold at a stated price per sack, to be removed immediately, and the contract was held to be a sale of chattels, solely, within the statute of frauds; because the contract was in respect to the potatoes and nothing else. As they were to be taken away at once, they could derive no further benefit from being in the ground, and the land was considered as *a mere warehouse for the potatoes*.

But in *Emmerson v. Heelis*,³ where growing turnips were sold and no specified time was agreed upon for their removal, and it not appearing as to the degree of their maturity, it was decided to be an interest in land. Here the land was to be something more than a warehouse for the

Parker v. Way, 15 N. H., 45; *thews*, 4 M. & W., 343; *Warwick Burnham v. Dunn*, 35 N. H., 560. *v. Bruce*, 2 Maule & Sel., 205.

¹ 5 B. & C., 836.

³ 2 Taunt., 38.

² 11 East, 365; *Sainsbury v. Mat-*

turnips; it was to afford support and sustenance to the turnips for an indefinite period. There are numerous cases, however, holding that a sale of a growing crop, which is not to vest in the purchaser until after the same has been severed from the soil, is an executory contract for the sale of goods, and falls within the statute.¹

§ 171. A case which may fairly be contrasted with *Parker v. Staniland*² is that of *Crosby v. Wadsworth*.³ There it appeared that farmer Wadsworth, of Claypole, in Lincolnshire, had a field of grass which Crosby desired to purchase. It was agreed that C. should have the grass for twenty guineas, he to have the trouble of mowing and making it into hay. Soon afterwards, however, W had a better offer for his grass (prospective hay), and so broke his contract with C. In C.'s action for the breach, he recovered *nothing*, the court holding that *the contract was one which had to do with land, and therefore should have been in writing*; that it was under the *fourth section* of the statute of frauds. By these and other cases cited it will be readily seen that it is somewhat difficult to extract a clear and satisfactory rule for determining when a sale of growing crops falls within the *seventeenth* and when within the *fourth* section of the statute of frauds.

§ 172. The case of *Wescott v. Delano*⁴ presents the question whether the growing grass goes to the grantee of the land, where it has been previously sold by the grantor, without notice to the grantee of the land.

In the court below the defendant asked to have the jury instructed, that if H. W., one of the plaintiffs, conveyed the land on which the hay was cut to George W. Delano (the defendant was William Delano), by deed containing no reservation of the grass growing upon the land, and so con-

¹ *Edwards v. Grand Trunk Rail-way Co.*, 54 Me., 105; *Bryant v. 39 Ind.*, 267; *Purner v. Piercy*, 40 Md., 212.

Crosby, 40 id., 9; *Kingsley v. Hol-* ² 11 East, 362.

brook, 45 N. H., 313; *Buck v. Pick-* ³ 6 East, 602 (1805).

well, 27 Vt., 157; *Ross v. Welch*, ⁴ 20 Wis., 514.
11 Gray (Mass.), 235; *Miller v. State*,

veyed it before the grass was cut, then Wescott could not acquire any right to the grass or hay unless by purchase from or consent of George W. Delano, made after the delivery of that deed to him.

Cole, J., held that the circuit court erred in refusing so to instruct the jury.

The learned justice concedes that there is "no little conflict among the authorities upon the point whether a parol agreement for the sale of growing trees, fruit, grass and other natural products of the earth, with the right on the part of the purchaser to enter upon the land and remove them, is or is not a contract for the sale of an interest in land, within the meaning of the statute of frauds."

He refers to *Rodwell v. Phillips*,¹ where Lord Abinger expressed grave doubts on the question, and spoke of the uncertainty of the law.

Judgment in favor of the plaintiff was reversed, and a new trial awarded.

§ 173. The question whether growing grass can be levied upon as a chattel, under an execution against the owner of the land, when it is turned out on the execution by the defendant, or when such levy is made by and with the parol consent of such defendant, is discussed in the *Bank of Lansingburgh v. Crary*.² There, as in *Green v. Armstrong*,³ the distinction was recognized between growing crops, which are the annual produce of labor and cultivation of the earth, and the natural produce of the earth, which grows spontaneously and without cultivation. The former are deemed chattels; the latter are an interest in land until severed from the land. Hence, grass, after being severed, may be seized as chattels under an execution. But growing grass does not come within the description of goods and chattels, and cannot be seized as such under a *fieri facias*; it goes to the heir and not to the executor.⁴

¹ 9 M. & W., 501.

² 1 Barb., 542.

³ 1 Denio, 552.

⁴ *Evans v. Roberts*, 5 B. & C., 836.

§ 174. In *Cutler v. Pope*,¹ which was an action of trespass for taking a quantity of hay, the grass standing when sold, and the sale being by parol, it was claimed that the contract was void under the statute of frauds; but the court decided that grass *already grown* and in a condition to cut, as the grass in question was, might be sold by parol, and that there is no objection to such sale arising from the statute.

§ 175. In regard to the sale of fruit, the rule which should distinguish between real and personal property under the statute of frauds is somewhat arbitrary, owing to the fact that much fruit is grown by great annual labor and much by little cultivation.

Nor can the rule be varied so as to meet the changes which occur in the cultivation of such products. Touching the question as to whether growing fruit falls within the statute of frauds, it is held that there is nothing in the fruit or vegetable which is an interest in or concerning land, when severed from the soil; they are alike mere chattels, and the severance may be in fact, as when they are cut and removed from the ground; or in law, as when they are growing, the owner in fee of the land, by conveyance, sells the land, reserving them by express provision.

As to sales of growing fruit, the court of Maryland and some other states have passed upon the question.

An able authority has declared it to be well settled that a contract for the sale of *fruits of the earth, ripe*, but not yet gathered, is not a contract for any interest in lands, and so not within the statute of frauds, though the vendee is to enter and gather them.²

§ 176. The statute of frauds of Maryland is the same as the English statute. The question whether a contract for the sale of growing fruit is affected by the statute of frauds was passed upon in *Purner v. Piercy*.³

¹ 13 Maine, 377.

² 1 Greenl. Ev., § 271.

³ 40 Md., 212; *Elliott v. Peterson*,

4 id., 476; *Bryant v. Crosby*, 40 Me.,

9-23; *Cutler v. Pope*, 13 id., 377.

It was there decided that a growing crop of peaches, or other fruit, requiring periodical expense, industry and attention in their yield and production, may be properly classed as *fructus industriales*.

The court, Stewart, J., substantially said that it would be giving to the statute of frauds a very latitudinarian construction to bring such cases within the mischief designed to be avoided by the statute.

The above case arose out of a parol contract by which the plaintiff agreed to sell to the defendant the crop of peaches then growing in his orchard, at a specified price, the defendant agreeing to gather and remove the peaches as they became ripe.

The court quoted with approval the deductions contained in Browne on the Statute of Frauds, which language is given in section 155 of this chapter, and concluded that, upon the facts in this case, it would be a perversion of the objects of the statute of frauds to hold as invalid the sale, in other respects legal, of the growing crop of peaches, with no intent of the parties to sell or purchase the soil, *but affording a mere license*, express or implied, to the purchaser to go upon the land to gather the fruit and remove the same.

The judgment in favor of the plaintiff was affirmed.

The above is one of the most recent, full and satisfactory cases on this particular subject.

§ 177. The following deductions may be reached from the foregoing cases: That a contract for growing crops in every case takes its character of realty, or personalty, from the principal subject-matter of the contract and the intent of the parties. That a sale of any growing produce of the earth, in actual existence at the time of the contract, *whether it be in a state of maturity or not*, is not a sale of an interest in or concerning land, but of personalty. It is *fructus industriales*. It is not affected by the statute of frauds. In other words, as is said by an able authority: "If the contract, when executed, is to convey to the purchaser a mere chattel, though it may be in the *interim* a part of the realty, it is

not affected by the statute of frauds." If, however, the contract contemplates that the purchaser is to have an exclusive "right to the land for a time, for the purpose of making a profit of the growing surface," the rule would be otherwise. And, in general, it seems to be well settled, that contracts for the sale of growing periodical crops—raised by the manurance and industry of man—do not fall within the operation of the statute of frauds.

CHAPTER VIII.

OF CONTRACTS FOR THE SALE OF GROWING TREES AND TIMBER.

- § 178. Principle governing the sale of standing trees.
- 179. Standing trees regarded as personalty, when.
- 180. Distinctions drawn in the cases as to personalty and realty in regard to growing trees; *Kingsley v. Holbrook*.
- 181. Construction of contracts for the sale of standing trees; as to license to sever them; the case of *White v. Foster*.
- 182. Contracts where the owner is to cut and deliver the timber; the case of *Killmore v. Howlett*.
- 183. Contract must be for work and labor, to take it out of the statute of frauds; *Ellison v. Brigham*.
- 184. Where subject-matter is to be converted into goods.
- 185. Distinction between *Smith v. Fisher* and *Gorham v. Fisher*.
- 186. Contract for saw-logs to be cut from a specified tract need not be in writing.
- 187. Illustration of the rule where timber is severed by the vendor, and the rule where trees are severed by the vendee.
- 188. What will amount to a delivery of possession of timber or trees; the case of *Smith v. Bryan*.
- 189. Example of contract to sell and deliver bending-stuff, and not a contract for labor, and within the statute of frauds.

§ 178. Under the English and United States decisions the question whether contracts for the sale of standing trees rooted in the soil are to be adjudged sales of personalty or realty seems to depend, in a measure, upon the particular circumstances surrounding the transaction itself; namely, first, whether the trees are to remain for any considerable time in the ground and are to receive sustenance from the soil; second, whether they are to be severed by the vendor or by the vendee; and, third, the particular terms and formalities of the contract itself.

§ 179. The weight of the authorities establishes that, where there has been an actual severance, or a severance by

force of a previous written instrument, standing trees are regarded as personal property.¹

Hence, a contract where A. agrees to cut trees standing on his own land into cord-wood and deliver the same at a specified price per cord to B., is not invalidated by not being in writing.

§ 180. The cases draw the distinction between natural products of the earth, and annual products raised by the industry of man and the cultivation of the earth. The former are adjudged to be a parcel of the land; the latter are personal property.

Thus, in *Kingsley v. Holbrook*,² Sargent, J., said: "In Massachusetts and Maine and some other states, the courts have held that a sale of trees growing upon land is not a sale of real estate, unless it is contemplated that they shall remain so as to receive profit and growth from the growing surface of the land; *unless the vendee was to have some beneficial use of the land in connection with the trees.* Where such is the case, then a sale of the standing trees is a sale of an interest in the land; otherwise not."³

The above doctrine seems to have been well established before the enactment of the statute of frauds, and the statute wrought no change in regard to such sales.

It is simply a contract by A. to bestow work and labor upon his own material and deliver it in an improved condition.⁴

§ 181. The courts have experienced some embarrassment at times in cases in determining, from the contract itself, whether it was the intention of the parties to grant a pres-

¹ *Gooding v. Riley*, 50 N. H., 407; *Hoit v. Stratton Mills*, 54 id., 110; *Warren v. Leland*, 2 Barb., 613.

² 45 N. H., 313.

³ 1 Lord Raymond, 182. See distinction in *Dunne v. Ferguson*, 1 Hayes (Irish) R., 542; 1 Greenleaf on Ev., § 271; *Banton v. Shorey*,

77 Me., 48; *Byassee v. Reese*, 4 Met. (Ky.), 373.

⁴ *Harris v. Frink*, 49 N. Y., 28; *Babcock v. Utter*, 1 Abb. App. Dec., 27, 49; *Hobbs v. Wetherwax*, 38 How. Pr., 388; *Marshall v. Ferguson*, 23 Cal., 69; *Evans v. Hardy*, 76 Ind., 532; *O'Donnell v. Brehen*, 36 N. J. Law, 258.

ent estate in the trees while growing, or only a right, either definite or unlimited as to time, to enter and cut, with a title to the property when it becomes a chattel. "If," says the court, Colt, J., in *White v. Foster*,¹ "the former be the true construction, then it comes within the statute, and must be in writing; if the latter, then, though wholly oral, it may be enforced."

Upon the question of construction of such contracts, the learned judge says: "For the purpose of arriving at the intention of the parties, the mode in which the contract is made, whether oral or written, and, if the latter, whether under seal or not, must be regarded and may be decisive." He further says: "A simple oral contract for the sale of trees, to be removed in a definite time, would be construed as *not* intended to convey an interest in the land, because the parties must have known that such could not be its effect; while the same words, if incorporated into the granting part of a deed, with the usual clauses and formalities appropriate to a conveyance of real estate, and especially if full covenants of warranty be added, will be held to convey an interest in the realty and carry a present title in the property to the grantee."

And on the subject of a license, he said: "So a permission which, if oral, would only amount to a license to do an act or series of acts on another's land without possession of any estate therein, would, if put in the form of an agreement under seal, convey a permanent incorporeal right or easement, and that simply because the latter is the appropriate mode of creating such an estate."

The learned judge entirely refuted the position taken by the defendant in the above case, that if the contract is in writing and under seal, no other or greater interest passes than would pass by the use of the same language in an oral sale. The subject-matter of the contract is the same in both, but the contracts themselves may receive a different interpretation. As appeared in the above case, the defendant's

¹ 102 Mass., 375. See, also, *Parsons v. Smith*, 5 Allen, 578.

grantor conveyed to the tenants all the standing timber on the demanded premises [this was for a writ of entry to recover land], with a proviso that it should be removed within three years. He afterwards mortgaged the land by a deed containing a reservation of all the trees growing on the same, describing them as having been sold to the tenants, and then conveyed it to the defendant with full covenants of warranty, excepting only the said mortgage.

The court, in deciding that the verdict of the court below in giving judgment for the demandant should be set aside and a new trial had, held that the deed under which the tenants claimed conveyed "an interest in real estate." "A present interest of the trees was granted, and, by the rule that the grant of a thing carries with it, as incident, all that is necessary to its beneficial enjoyment, there passed by the same deed a right to the soil upon which they grew."¹

§ 182. In general the decisions hold that, if the contract is that the owner of the timber land is to cut and deliver the timber in a cut or improved condition, the contract is binding although resting simply in parol.

Thus, in *Killmore v. Howlett*,² the defendant agreed, by parol, in consideration of the plaintiff paying him \$5 per cord, to cut the trees, then standing and growing on eighteen acres of his land, into cord-wood and deliver the same to the plaintiff at his wood yard in Syracuse. The defendant delivered a part of the wood, when, the price of cord-wood having advanced, he refused to deliver the remainder.

At the trial below the defendant moved for a nonsuit upon the ground that the contract was for the sale of an interest in land.

The motion was denied. The defendant appealed.

¹For cases involving the same and kindred subjects, see *Giles v. Simonds*, 15 Gray, 441; *Ersine v. Plummer*, 7 Greenl., 447; *Edwards v. Grand Trunk Railway Co.*, 54 Me., 105; *Slocum v. Seymour*, 7 Vroom, 138; *Chamberlain v. Smith*, 21 U. C. Q. B., 103; *Smith v. Benson*, 1 Hill (N. Y.), 176; *Owens v. Lewis*, 46 Ind., 488.

²48 N. Y., 569.

From the general term an appeal was taken to the court of appeals. There the judgment was affirmed.

Gray, J., in affirming the judgment, conceded that if the standing trees, which by the contract were to have been cut by the defendant and delivered by him to the plaintiff, had been sold while standing and "rooted in the soil," the right of the plaintiff to enter and fell them and make them into wood would have been a sale of an interest in the land, and without any writing would have been void.

"But," said the court, "this was not a sale of the trees in their standing condition, but rather a contract whereby the defendant, the owner of the land, was to bestow work and labor upon his own materials and deliver it in its improved condition to the plaintiff."

Clearly there was no intention to give the vendee any property in the trees until they were severed from the freehold. The contract, therefore, was not void under the statute of frauds.

"Apply the rule contended for by the defendant," said the court in a well-considered opinion, "and a writing would be indispensable to the validity of a contract by the owner of a peat bed or sand bank, to deliver a load from it. Such contracts are never regarded as carrying an interest in the real estate from which the thing sold was to be taken by the owner."

§ 183. The contract, as stated in *Ellison v. Brigham*,¹ is the same, except in name, as that in *Smith v. Surman*.²

There the defendant agreed to cut into logs all the *butter-nut trees* then standing on a certain part of his farm that were suitable for logs, and deliver them, together with a few logs then cut, to the plaintiffs at Burnett's saw-mill, within a specified time, for which the plaintiffs agreed to pay the defendant a stated price per cord, when measured at the mill.

¹ 38 Vt., 64. See, also, *Clafin v. Carpenter*, 38 Am. Dec., 381, and note; *Marshall v. Ferguson*, 23 Cal., 69. But see *Putney v. Day*, 25 Am. Dec., 470; 6 N. H. R., 430.
² 9 Barn. & Cress., 561.

In order to perform the contract it was necessary for the defendant to sever the bodies of the trees from the stump, and cut them into sections suitable for delivery. It was not in any sense contemplated that the property should be manufactured or essentially changed in condition. The labor bestowed upon the property was by the defendant, and for himself.

The court, Pierpoint, J., said: "The fact that work and labor is to be performed upon the subject-matter of the contract, before it is to be delivered, in accordance with the terms of the contract, does not necessarily take it out of the statute. . . . The fact that labor is to be bestowed upon the property to remove it from the place where it is at the time of the contract, to the place of delivery, is not sufficient." He substantially held that it must be of such a character as to bring the contract within the rule that excepts from the operation of the statute contracts for the manufacture of property, or convert it substantially into a contract for work and labor. The judgment for the defendant was affirmed.

§ 184. In *Smith v. Surman*, *supra*, where the bargain was for timber, the trees from which it was to be cut then standing on the vendor's land, Littledale, J., held that it was a sale of goods within the statute of frauds. "Where the contracting parties contemplate a sale of goods," said the court, "although the subject-matter at the time of making the contract does not exist in goods, but is to be converted into that state by the seller bestowing work and labor on his own raw material, that is a case within the statute."

§ 185. In the recent case of *Smith v. Fisher*,¹ the principal ground of the plaintiff's contention was that the statute of frauds was no defense because there had been an acceptance and receipt of the logs, the subject of the action. The contract was for the sale of all the plaintiff's logs in

¹3 New Eng. Rep., 824 (Vt.), decided March, 1887.

the mill-yard of a third person. It appeared that the defendant agreed to take the logs at an agreed price per thousand feet, with the right to reject one-fourth part of the lumber cut from them as he might select. The plaintiff had no duty in respect to the sawing, as the defendant himself agreed to pay for and direct as to that. The court, Veazey, J., says: "The evidence plainly tended to show an acceptance;" and so, also, the verdict implied. Without an express finding of an acceptance, said the court, the facts would warrant a judgment for the plaintiffs.

In distinguishing the above case from *Gorham v. Fisher*,¹ the court said: "This bill of exceptions, as I interpret it, shows a sale of logs as logs, not as boards, as the court construed the report in the last named case. In the case at bar the defendant took the logs as they were, without any duty whatever on the part of the plaintiffs; while in the other case there was a sale of logs, subject to delivery and acceptance *when the logs should be sawed into boards by the plaintiff*."

Judgment for the plaintiff was affirmed.

§ 186. Where an action was brought to recover the price of two hundred and six logs, and the defense was that the logs were delivered under a contract whereby the plaintiff's assignor agreed to deliver all the marketable pine saw-logs which could be cut from the "Perry" lot, in Wilton, and deliver them at defendant's saw-mill at the price of \$2 per log, there to be measured and counted, which the defendant agreed to accept and pay for; and it appearing that the plaintiff's assignor cut a large number of logs from the said lot, in addition to the two hundred and six, which he refused to deliver to the defendant, by means of which the defendant sustained damage; the court adjudged, *first*, that it was not a contract for the sale of standing timber; and *second*, that it was not essential to its validity that it should be in writing; and, therefore, the defense interposed could be established under it.

¹ 30 Vt., 428.

The judgment of the court below was reversed and a new trial granted.¹

§ 187. In *Stephens v. Santee*² the plaintiff claimed title to certain railroad ties purchased from one Allison, who had bid them in at a sheriff's sale on an execution against the property of one Daniels, who was the alleged owner at the time.

The referee found that Daniels owned or was in possession of a piece of land, upon which were growing oak and hemlock timber, suitable for railroad ties, and that he entered into an oral agreement with the defendant to cut and deliver one thousand hemlock ties at twelve cents apiece, to be paid for as the work progressed, and to deliver them on the side of the railroad track, in condition for loading on the cars.

Daniels cut and hauled out upon the lands of Crosby timber for about eight hundred ties, previous to February, 1862; the trees were not cut up into ties, but were of different lengths, nine-tenths of them being more than one tie in length.

They were in this condition until February 11, 1862, when they were cut up and piled upon the side of the railroad track by Daniels.

A judgment, wherein Allison was plaintiff, and Daniels defendant, was docketed in Steuben county for \$183.50. Execution thereon was issued to the sheriff, who levied upon the said ties, and they were sold to Allison, who, before the commencement of this action, sold his interest in them to this plaintiff. The ties were on Crosby's land when the levy was made.

The referee decided that the timber was transferred to the defendant and became his property as soon as it was severed from the stump, and this was before February 8, 1862. He also found that the judgment against Daniels was void, as well as the purchase by the appellant; that the plaintiff was not entitled to recover. The plaintiff excepted and appealed.

¹ *Boyce v. Washburn*, 4 Hun, 792.

² 51 Barb. (N. Y.), 533.

Johnson, J., held, as found by the referee, that the contract was not within the statute of frauds, but belonged to that other class of contracts where the vendor agrees to furnish materials, and *manufacture* for and deliver to the vendee, at a future day.

The true criterion, says the court, in all such cases is, whether the work and labor required in order to prepare the subject-matter of the contract for delivery is to be done for the vendor himself, or for the vendee. If for the latter it is simply a case of hiring, and not within the statute.¹

Here the labor was manifestly for the respondent, upon his employment. The verbal delivery or turning out was of no consequence. But by the agreement the timber was to belong to the respondent the moment it was severed from the stump, and the vendor was to work it up into ties for the vendee, as his employer.

Clearly the timber became the property of the vendee, as soon as it was severed from the stump.

The judgment was affirmed at the Monroe general term.

§ 188. There may be found some cases in the books decided upon about the following facts: A., by a contract in writing, sells to B. certain trees standing on his land, with the right in B., within a specified time, to cut and carry away any part of them; and within the stated time B. does cut and carry away some of them, and then by a parol contract sells the remaining standing trees to A. The question in such a case is whether a memorandum in writing is necessary under the statute of frauds.

In *Smith v. Bryan*,² upon a similar state of facts, the plaintiff contended that inasmuch as the defendant was owner and in possession of the land on which the trees were growing, the sale, *eo instanti*, by force of law, gave possession of the trees to the defendant.

The contract was held to be governed by the statute of frauds.

The court, Le Grand, C. J., says: "It was not physically

¹ *Parker v. Schenck*, 28 Barb., 38; ² 5 Maryland, 141; 59 Am. Dec.,
Bronson v. Wiman, 4 Selden, 182. 105.

possible for the plaintiff to give him a more perfect possession, unless he had severed the trees from the soil, which, by the terms of the contract, he was not bound to do, and which, in all probability, would have defeated the motive of the defendant in making the repurchase, it being most likely that he was induced to engage in the transaction by a desire to have the trees remain standing on his land."

The judgment was reversed and *procedendo* awarded.

The statute of frauds of Maryland is the same as the statute, 29 Car. 2.

§ 189. In *Clark v. Nichols*,¹ the defendant agreed to deliver to the plaintiff fifteen thousand feet of ash bending-stuff, for the price of \$34 per thousand feet, and fifteen thousand feet of ash plank, for the price of \$25 per thousand feet, before a certain date.

The answer interposed the statute of frauds. The plaintiff below testified to this contract, and also that the bending-stuff was the butts of trees sawed so as to render them suitable to be manufactured into wagon shafts, and that "the defendant was to saw all logs not suitable for bending-stuff into plank of various dimensions, under the direction of the plaintiff."

The contract was held to be within the statute of frauds.

A verdict was given for the defendant. On appeal Chapman, C. J., said: "As the contract is stated in the bill of exceptions, we think it was a contract to sell and deliver the bending-stuff and plank, and not a contract for labor in manufacturing the articles."²

¹ 107 Mass., 547.

² It was not, therefore, like the cases of *Mixer v. Howarth*, 21 Pick., 201, and *Spencer v. Cone*, 1 Met., 283; but like *Gardner v. Joy*, 9 Met., 177; *Lamb v. Crafts*, 12 Met., 353, and *Waterman v. Meigs*, 4 Cush., 497, where a quantity of planks for ship building was to be delivered at a future time, at a

specified price, it was held to be a contract of sale of goods. In *Stansell v. Leavitt*, 51 Mich., 537 (44 id., 424; 48 id., 225), it is held that a contract for personalty is not vitiated for want of a compliance with the statute of frauds relating to realty, merely because the two are written on one paper.

CHAPTER IX.

OF CONTRACTS FOR GROWING TREES — WHERE THE VENDEE IS TO SEVER THEM.

- § 190. General observations on the subject.
191. Test in determining whether standing trees are personalty.
192. Where vendee is to sever the trees; case of *Green v. Armstrong*.
193. Example of contract for lumber within the statute of frauds; *Wetmore v. Neuberger*.
194. Example where vendee is to enter upon the land and cut timber.
195. Contract for sale of standing trees must be in writing.
196. Unsealed contract for the sale of standing timber in perpetuity, valid; *Warren v. Leland*.
197. Damages for preventing the removal of timber by vendor cannot be recovered.
198. After severance of trees by the vendee they vest in him.

§ 190. It has been shown in the preceding chapter that by the well-considered decisions, where the owner of woodland contracts to cut and deliver the wood in a changed condition,—into cord-wood, for instance,—*such a contract is not affected by the statute of frauds*.

It seems to be held by many cases, on the other hand, that if the contract be for the sale of trees in their standing condition, rooted in the soil, with the *right in the vendee* to enter upon the land and cut and carry away the trees, at any future time, whether fixed or indefinite, it is a sale of an interest in land, and the contract must be in writing in order to be binding.

This rule has not always been regarded. In fact such contracts have been construed as not intended to convey an interest in land. In such cases, it is somewhat dependent upon the particular construction the terms and formalities used in the contract are susceptible of.

§ 191. Another distinction is made in the decisions, and that is, between a contract for the sale of growing trees

where there is to be an immediate severance and delivery, and where the trees are to remain standing and rooted in the soil for an indefinite period. The former contract may be by parol, the latter must be in writing to be binding under the statute.¹ Thus, in *Marshall v. Green*,² it was said by Lord Coleridge, C. J., that, apart from any decisions on the subject, and as a matter of common sense, it would seem obvious that a sale of twenty-two trees to be taken away *immediately* was not a sale of an interest in land, but merely of so much timber. Here the trees were to be cut "as soon as possible." Grove, J., in the same case, thought the test would be *whether the parties really looked to the trees deriving benefit from the land, or merely intended that the land should be in the nature of a warehouse for the trees during that period.*

§ 192. A case entitled to much weight is that of *Green v. Armstrong*.³ There, the defendant sold twenty-two basswood trees standing on his land, to the plaintiff, at the rate of one shilling and six pence per saw-log, to be paid for when cut and carried away, the plaintiff being at liberty to cut and take them away at any time. After a part of the trees had been cut, taken away and paid for, the defendant forbade the plaintiff to take away any more. All except two of the trees in question were selected and marked by the parties. At the trial, judgment was rendered for the plaintiff; it was reversed by the court of common pleas, on *certiorari*, on the ground that the contract was for the sale of an *interest in land*, and not being in writing was void under the statute of frauds.

¹ *Parsons v. Woodward*, 2 Zab. R., 196; *Parker v. Staniland*, 11 East, 362; *Chitty on Cont.*, 11th Am. ed., 415, 416 and note.

² 1 C. P. Div., 35, 40.

³ 1 Denio, 552 (1845); *Bank of Lansingburgh v. Crary*, 1 Barb., 542 (1847); *Lawrence v. Smith*, 27 How. Pr., 327. See *Pierrepont v.*

Barnard, 5 Barb., 372, where the case of *Green v. Armstrong* is declared by Gridley, J., to be the law of the land; *Pitkin v. Noyes*, 48 N. H., 294; *Crosby v. Wadsworth*, 6 East, 602; *Olmstead v. Niles*, 7 N. H., 522; *Jones v. Flint*, 10 Adol. & El., 753.

Beardsley, J., in the above case, gives a very clear exposition of the law as to the distinctions to be drawn between personalty and realty in a sale of anything attached to the soil.

§ 193. In *Wetmore v. Neuberger*,¹ the action was by Neuberger as indorsee of a promissory note given by Wetmore & Co. to one Pattison or order for \$250, August 26, 1878.

The Wetmores pleaded the general issue with notice of set-off. The justice found in favor of Neuberger.

The Wetmores appealed.

Pattison had transferred the note to Neuberger after maturity. The giving of the note grew out of a lumbering transaction between Wetmore & Co. and Pattison. There was an agreement in writing dated May 17, 1878, whereby Pattison agreed to get out and deliver to Wetmore & Co., at Marquette, in such booms as should be furnished, Norway logs enough and of specified sizes and qualities,—“suitable to be accepted by the parties contracting with said Wetmore & Co.,” and to deliver the same by September 1, 1878. Pattison agreed to pay “\$5 per thousand, board measure, sealed in the boom at their mill,” and to cut and deliver to the Wetmores “white pine logs up to two hundred thousand, board measure, of good sound logs, not culled out for board timber, but taken as the timber will cut, taking all good sound trees, for which W. & Co. agreed to pay \$4.50,” etc.

Logs over twenty-four feet were to be scaled in two lengths; “final settlement to be upon the delivery of all such logs.”

Pattison cut and delivered to the Wetmores a great quantity of logs, and they in return made payments and advances, the note in suit being given to be applied upon the contract.

It was claimed by the Wetmores that, at the time of the

¹ 44 Mich., 362.

transfer of the note to Pattison, their payments were in excess of the entire demands in favor of Pattison, beyond the sum called for by the note, and that this was a lawful set-off, sufficient to extinguish the note, a balance actually existing in favor of the Wetmores of over \$400.

The plaintiff, in the court below, averred that the contract quantity of logs was not furnished, and that the agreement was broken by the Wetmores. It was part of their contract with Pattison that he should not be bound to pay above \$1 per thousand feet stumpage on any land owned by Lac La Belle Company.

On June 4th, following, they made a purchase of the stumpage on certain land, which, according to the indications in the case, was Lac La Belle Company's land, and they claim to have paid \$1,000 for it. In their account they charged Pattison, "August 3. Paid Lac La Belle Company, stumpage as per verbal agreement with Pattison about May 12, 1878, \$1,000." The court said: "There was no writing between Pattison and the Wetmores in regard to their buying for him, or on his account, this body of stumpage for \$1,000, and the written purchase actually made was in their own name and apparently on their own account. Their claim seems to be, in reference to it, that subsequent to their written agreement with Pattison of May 17, it was orally agreed between them that they should buy this tract of stumpage at \$1,000 and pay therefor, and that he would take it in their business arrangements and pay them the \$1,000 so that they should be exposed to no risk, and that they made the purchase on that understanding and debited him with the expense in their account.

"Assuming this explanation to be true, the transaction was within the statute of frauds, and the objection raised on that theory was well taken.

"The scheme contemplated that the Wetmores should provide the purchase money in advance, and in virtue of a power from Pattison expend it in buying an interest in land

in his favor. Such an arrangement is destitute of force unless manifested by writing.¹

"The contract was entire, and the stipulation for the Wetmores to advance the money cannot be separated from the rest."

Judgment was reversed.

§ 194. In *Slocum v. Seymour*,² the plaintiff conveyed to the defendant, by an instrument in writing, all the wood and timber upon a certain tract of land, with the right in the vendee to cut and remove the same; and the court below charged the jury that it was a contract for the sale of personal property. The appellate court held this to be error.

Bidle, J., in conceding a great diversity in the cases, whether a sale of standing trees is a chattel interest, said: "In no sense can trees, the natural and permanent growth of the soil, be regarded as partaking of the character of emblements, or *fructus industriales*, but are a part of the inheritance, and can only become personalty by actual severance, or by a severance in contemplation of law, as the effect of a proper instrument in writing."

The judgment was reversed.

§ 195. So, also, in *Daniels v. Bailey*,³ where the complaint, before it was amended, was for the consideration of a sale of the respondent's interest in the standing timber upon certain lands, and as amended, after verdict, it was for the consideration of a sale of the respondent's interest in a contract of sale of the standing timber.

¹ Comp. L., sec. 4692; *Russell v. Myers*, 32 Mich., 522; *Colgreve v. Solomon*, 34 Mich., 494; *Hillebrands v. Nebbelink*, 40 Mich., 646.

² 36 N. J. (7 Vroom), 138; *O'Donnell v. Brehen*, 36 id., 257. See, also, *McGregor v. Brown*, 10 N. Y., 117; *Putney v. Day*, 6 N. H., 430. This is also true of the English cases, although somewhat conflicting. *Tyler v. Bennett*, 5 A. & E., 377. An adverse rule may be found in 1 Lord Raymond, 183; *Buller's Nisi Prius*, 282. But see *Scovell v. Boxall*, 1 Younge & Jervis, 395, where *Hullock, B.*, regards Lord Raymond's opinion as mere *dictum* and not as an authority. See, also, *Teal v. Auty*, 2 B. & B., 99, to the same effect, as to the purchase of growing poles.

³ 43 Wis., 566; *Warner v. Trow*, 36 id., 195.

The court, Ryan, C. J., says: "Whether of the one or of the other, the sale proved was by parol, wholly unexecuted; was equally the sale of an interest in land, and void under the statute of frauds."

The judgment for the plaintiff was reversed and the cause remanded to the court below for further proceedings according to law.

§ 196. The decision in *Warren v. Leland*¹ is a clear exposition of the law and also of the distinctions to be borne in mind in determining whether a sale of growing trees is within the statute of frauds. This was an action of replevin in the *cepit* for three hundred and fourteen white pine saw-logs by measure. By a written contract, unsealed, dated December 18, 1833, signed by Stevenson and Farlin, Stevenson *agreed to sell to Farlin* for \$800, to be paid in yearly payments of \$200 each, the *pine timber* on certain lots in the "Schroon tract;" Farlin to give his note, payable at the Saratoga County Bank, indorsed by Miles Beach, on or before the 1st of February, 1834.

Paige, J., says: "I have come to the conclusion that the contract of the 18th of December, 1833, although unsealed, was a valid conveyance in perpetuity of the pine timber standing on the lots mentioned therein at the date of the contract." He held that the term "conveyance," used in the Revised Statutes,² does not necessarily import a deed under seal. So long as they are annexed to the land and are neither actually nor in contemplation of law severed therefrom, they cannot be sold or transferred by parol. He reiterates his views as expressed in the *Bank of Lansingburgh v. Crary*.³ Hence, it may be said that growing trees, when they are the subject of an ownership distinct from the ownership of the soil, are no longer deemed as annexed to the realty, but are regarded as chattels personal merely, like growing crops of grain or vegetables, which are the annual produce of labor and of the cultivation of the earth.

¹ 2 Barb., 613.

² 1 Barb., 542.

³ Vol. 2, p. 137, § 6 and tit. 1.

“But while growing trees are parcel of the realty,” says the learned judge, “do they so much partake of the character of the latter as to require a writing under seal from the owner of the fee to convey an estate in perpetuity in them, distinct from the ownership of the soil? They are parcel of the realty. A conveyance of them is the conveyance of an interest in lands. They are therefore within the statute of frauds, and can only be sold or conveyed by a conveyance in writing. But is a conveyance of growing trees by the owner of the fee of the land, to a third person, the conveyance of a freehold estate? Simultaneous with the execution and delivery of the conveyance the trees are severed, in law, from the earth and become chattels personal, and the interest which passes to the grantee is not a freehold estate, but an interest in perpetuity in personal estate, which may be conveyed by a writing without seal, and even by parol. Can it then be said that such a conveyance is the conveyance of a freehold estate? I think not. For the reason that a freehold estate does not pass by the conveyance, but merely the title to a chattel.”

The above observations by the court are to be deemed applicable to a conveyance of the growing trees standing on the land at the time of the conveyance, and not to a conveyance of an interest in any future trees which may grow on the land, which might embrace an exclusive interest in the soil as far as may be necessary for the support and nourishment of the trees; and these observations ought, perhaps, also to be qualified by an application of them to a conveyance of growing trees in prospect of their separation from the soil within a reasonable time.

§ 197. *Lawrence v. Smith*¹ was an action to recover a balance due on a note given by the defendant for certain oak timber trees standing on the plaintiff's farm. The defense was for \$100 damages, by reason of the plaintiff having stopped the defendant from carrying away the timber, the plaintiff not being satisfied as to the responsibility

¹ 27 How. Pr., 327.

of the indorser on the note. The court below charged that the defendants could not set off the damages sustained, as the agreement was void under the statute of frauds.

The defendant appealed.

Daniels, J., at general term, sustaining the judgment, said: "The contract, for the breach of which the defendant claimed to be entitled to damages, was for the sale of standing trees, and not being in writing was void.

"The plaintiff incurred no obligation in law by which the defendant Smith could insist upon the agreement against his refusal to observe it.

"Even if it be conceded that the defendant could have enforced a specific performance of the agreement in equity, that will in no way aid the claim he now makes for damages; for courts of equity do not remunerate parties by damages arising out of the breach of agreements which are void under the statute of frauds. When these contracts are enforced specifically in equity, it is, in part, owing to the circumstance that no recovery in damages for the breach of them can be had at law. There was, then, no legal or equitable obligation resting on the plaintiff to pay the damages caused by his interruption of the work of cutting and removing the trees. The most that can be said is, that he was under a moral obligation to do so.

"The promise predicated on that, after the additional indorser was given on the note, to allow the defendant \$100 by way of damages for such interruption, was without consideration. It did not, therefore, entitle the defendant to a recovery of that sum upon the trial of this action."

In order to render the promise in the above case binding, the obligation forming its consideration should have been one that at some time could have been enforced in law or equity against the plaintiff. There was no such consideration in this case.¹

¹ See, also, 1 Parsons on Contracts, 358, 361; Ehle v. Judson, 24 Wend., 99; Cameron v. Fowler, 5 Hill, 308.

§ 198. It was held in a well considered case in Vermont, that, if the contract is for a valuable consideration, and has been executed by the vendee, by his actually severing the trees from the freehold under the contract, the property in the trees would doubtless, when cut, vest in the *vendee*, and become his.¹

¹Buck v. Pickwell, 27 Vt., 157.

CHAPTER X.

CONCERNING LICENSE IN THE VENDEE TO ENTER UPON LAND AND REMOVE TIMBER.

- § 199. Of the general rights of the vendee to enter upon land.
- 200. Definition of license; may be granted without deed or writing.
- 201. Construction of license; it passes no interest in land; the case of *Whitmarsh v. Walker*.
- 202. Concerning nursery trees as chattels.
- 203. Severance of anything attached to the freehold under a special license; *Smith v. Bryan*.
- 204. Where timber is to be cut immediately, license implied.
- 205. After severance timber cannot constitute an interest in land.
- 206. The presumption arises that the licensee is acting under the permission of the licensor; *Spalding v. Archibald*.
- 207. Example where the vendee was to sever the trees; *Owens v. Lewis*.
- 208. License is revoked *ipso facto* by the death of licensor, or by a conveyance of the premises.
- 209. After a license is executed the licensee has a complete defense against an action by the licensor.
- 210. A contract giving a party the right to clear the trees in consideration of his sowing down the land is valid; *McGregor v. Brown*.
- 211. Distinction between a license and an interest in land; *Johnson v. Wilkinson*.
- 212. Where the vendee is to enter upon land and sever trees under a license to do so, it is not a contract for interest in land, but of personalty; *Banton v. Shorey*.

§ 199. It has been stated as a ruling principle, that where chattels are sold, which at the time are upon the land of the vendor, a license in the vendee to enter upon the land for the purpose of receiving the property is implied.

The proposition, however, that the vendor cannot deprive the vendee of his property, nor put him to an action for its recovery by withdrawing such implied permission, said the

court, in effect, in *McLeod v. Jones*,¹ does not apply to a case where a severance from the realty is necessary to convert the subject of the sale into personalty, and the revocation is made before such severance.

The court said that a right or license to enter upon land results, or may be inferred, from the contracts of the parties in relation to the personalty. To be efficacious for any purpose it is necessary that the license be granted by the actual owner, nor can it in any case extend beyond the interest he has in the premises.²

§ 200. In an early Massachusetts case, Chief Justice Parsons has given, in a few words, a clear and satisfactory definition of a license.

He says: "A license is technically an authority to do some one act, or series of acts, on the land of another *without passing any estate in the land*, such as a license to hunt in another's land, or *to cut down a certain number of trees*. These are held to be revocable while executing, unless a definite time is fixed, but irrevocable *when executed*."

"Such licenses to do a particular act, *but passing no estate*, may be pleaded without deed."³

But it is held otherwise, where the license amounts to the granting of an *estate* for ever so short a time.

And a beneficial license, to be exercised on land, may be granted without deed and without writing; and if granted upon a valuable consideration, and acted upon, cannot be revoked, say the English cases.⁴

§ 201. *Whitmarsh v. Walker*⁵ was an action upon an agreement to deliver certain mulberry trees on the ground where they were growing. The plaintiff paid \$10 down

¹ 105 Mass., 403; *Wood v. Manley*, 11 Ad. & E., 34.

² *Richardson v. Richardson*, 9 Gray (Mass.), 213; *Petty v. Evans*, 2 Brownl., 40.

³ *Cook v. Stearns*, 11 Mass., 533. To the same effect is the decision in *Johnson v. Wilkinson*, 139 Mass., 3.

⁴ *Taylor v. Waters*, 7 Taunt., 374. See, also, *Mumford v. Whiting*, 15 Wend., 380, where Savage, C. J., elaborately discusses the subject and reviews the several authorities.

⁵ 42 Mass., 313.

and agreed to pay the rest on the delivery of the trees. Defendant refused to deliver them. The trees, at the time of the contract, were rooted in the ground in the defendant's close, and were raised for the purpose of sale and transplantation.

The defendant contended that the agreement was void by the statute of frauds, on the ground that the trees were growing and rooted in the soil, and appertained to the realty at the time of the sale.

On the other hand, it was contended that the trees contracted for were raised for sale and transplantation, and like fruit trees, shrubs and plants rooted in the soil of a nursery garden, were personal chattels.

"According to the true construction of the contract as we understand it," said the court, "the defendant undertook to sell the trees at a stipulated price, to sever them from the soil, or to permit the plaintiff to sever them, and to deliver them to him on demand; he at the same time paying the defendant the residue of the price. And it is immaterial whether the severance was to be by the plaintiff or the defendant. For a license for the plaintiff to enter and remove the trees would pass no interest in the land, and would, without writing, be valid, notwithstanding the statute of frauds.

"We think it therefore clear," said the court, "that, giving to the contract the construction already stated, the plaintiff is entitled to recover. If, for a valuable consideration, the defendant contracted to sell the trees and to deliver them at a future time, he was bound to sever them from the soil himself, or to permit the plaintiff to do it, and if he refused to comply with his agreement, he is responsible in damages."

§ 202. In *Miller v. Baker*,¹ the question also arose as to whether fruit trees, shrubs and plants, rooted in the soil of the nursery garden, can properly be denominated chattels. This was an action of trespass against the sheriff for taking

¹ 142 Mass., 27; *Nuttleton v. Sikes*, 49 id., 34.

nursery trees, shrubs, etc., and converting them to his own use.

The decisions generally give a liberal construction in favor of a tenant's rights to remove property placed by him upon the land. In this case the plaintiff claimed the property under an instrument executed by one Senior. The land in which said trees and shrubs were growing had been demised to Senior to be occupied for a nursery garden. The court held that the products of this garden, as regards the interest of Senior, may well be considered to be articles of trade and sale.

§ 203. The contention of the plaintiff, in *Smith v. Bryan*,¹ under the contract as proved, was in accordance with the cases generally.

The following principles may be reasonably declared from the authorities, both in England and in this country: If the timber, or other produce of the land, or any other thing annexed to the freehold, is specifically sold, whether it is to be severed from the soil by the vendor, or to be taken by the vendee, *under a special license* to enter for that purpose, it is still, in the contemplation of the parties, evidently and substantially a sale of goods only. The court further said, that "the contract by which originally the defendant in this action sold to the plaintiff the trees was one for the sale of goods; and as this was the character of the thing purchased by the plaintiff, that character was retained up to the time when the plaintiff resold to the defendant." Assuming the premises of the learned judge to be true, that the trees sold under the contract were *substantially goods*, the deductions reached seem to be sound, as adjudged by the English cases, which evidently is the guide of the court in that case.

§ 204. If, under a parol contract, certain timber is to remain on the land during the pleasure of the buyer, or for an indefinite period, it might affect injuriously subsequent pur-

¹ 5 Maryland, 141. See, also, 1 Brigham, 38 Vt., 64; *Marshall v. Greenleaf on Ev.*, § 271; *Ellison v. Green*, 1 Q. B. D., 35.

chasers of the land. On the other hand, if the timber is to be cut and carried away immediately, or within a reasonable time, it is not liable to the same objection; nor would trespass lie by the original owner for entering and cutting under such a contract, *as it would at least amount to a license, which need not be in writing.*¹

§ 205. In *Erschine v. Plummer*,² where the plaintiff entered under the contract and by permission of the owner, cut the timber, carried it away and paid the full consideration demanded, it was held that the actual receipt of the price constituted a sale of the timber after it was severed, if it was not consummated before. After it was severed there could be no pretense that it constituted an interest in land, and a sale thus made is entirely relieved from any objection arising under the statute of frauds.

In *Greeley v. Stilson*,³ it was held that a *parol license* to cut timber for a fixed price for stumpage is not invalid, and is not covered by the statute of frauds, either as a sale of an interest in land or as a sale of chattels.

§ 206. Thus, *Spalding v. Archibald*⁴ is a case where it was held that a *license* to cut the timber follows a verbal sale of it, and will protect the purchaser from anything done under it prior to its revocation. Such a right continues until recalled; and as trees and timber become severed, the contract of sale attaches to them as chattels, and they may be removed as property of the vendee.⁵

Cooley, J., said: "It was suggested on the part of the plaintiff, that, to give the transaction this effect, it should be shown that he had actual knowledge that the cutting was proceeding; but this was not important; *he was bound to assume his consent would be acted upon.*"

¹ *Green v. Armstrong*, 1 Denio, 556.

² 7 Maine, 447 (1831); *Cook v. Stearns*, 11 Mass., 533.

³ 27 Mich., 153; *Lee v. McLeod*, 12 Nev., 280; *Terrell v. Frazier*, 79 Ind., 473.

⁴ 52 Mich., 365 (1883).

⁵ *Greeley v. Stilson*, 27 Mich., 157; *Haskell v. Ayers*, 35 id., 93; *Claffin v. Carpenter*, 4 Met., 580; *Pierrepont v. Barnard*, 6 N. Y., 279.

The above case is in accord with the current line of decisions, and well illustrates them.

In the course of an able judgment, Mr. Justice Cooley said that it "did not follow, because a sale is void under the statute of frauds, the purchaser can derive no title under it. Such a sale is void only at the option of the parties concerned, and if they elect to treat it as valid, it may become effectual for all purposes. And commonly, even if not wholly affirmed, it will operate as a license which will protect the purchaser against liability for anything done under it prior to any act of revocation.

"A license very often assumes the form of a sale, and it only fails to become a sale because of not being put in legal form."

After reviewing the evidence, the court concluded that the whole transaction was invalid from the first, and "that either party might have refused to recognize or act upon it."

§ 207. While in general, in Indiana, it is held that the sale of standing trees is a sale of an interest in land, in *Owens v. Lewis*¹ it was decided that a parol agreement for the sale of growing trees, the trees to be severed and taken from the land *by the vendee*, as in that case, *will amount to a license* for the vendee to enter upon the vendor's land for the purpose of making such severance; "and if such license is not revoked before the trees are severed, the title to the trees will vest in the vendee, and the license after severance will become coupled with an interest and irrevocable, and the vendee will have a perfect right to enter and remove the trees thus severed."

The above exposition gives the law in a small compass and is very satisfactory.

So, in an important Vermont case, it was clearly held that when the owner of timber sold it and permitted the purchaser to cut the poles (the subject of the contract), he at the same time gave him authority and license to take

¹46 Ind., 488; 15 Am. R., 295. and *Lumber Company*, 87 Ind., See, also, *Cool v. The Peters Box* 536.

them away. When the purchaser, by such a permission, has cut the poles they become his personal property, and he thereby acquires a perfect right to enter upon the land and take them away. Nor is such right confined to the person of the purchaser, but they may be removed by his agent or servant.¹

§ 208. But it seems to be well settled by the cases, on the other hand, that if a parol license be granted to do a given act on the owner's land, such license is revoked *ipso facto* by the death of the licensor, or the conveyance of the premises by him, and nothing can save it from the operation of this rule.²

Lord Ellenborough once said that "a license is not a grant, but may be recalled immediately."³

§ 209. There are several well considered cases, also, that seem to hold, as stated in effect by Mr. Wood, that a parol license to enter upon the land of another for any purpose, and that license-right has been wholly *executed*, affords a complete defense to the licensee against an action for doing such act, notwithstanding it was void under the statute of frauds, "and if executed *after* the revocation would have made the licensee a trespasser."⁴

§ 210. *McGregor v. Brown*⁵ was an action for waste, alleged to have been committed by the defendant upon a

¹ *Yale v. Seely*, 15 Vt., 221. In this case Hebard, J., delivered an able judgment, which will repay a careful perusal.

² *Carter v. Harlan*, 6 Md., 20; *Eggleston v. N. Y.*, etc., Railroad Co., 35 Barb. (N. Y.), 162; *Drake v. Wells*, 11 Allen (Mass.), 141.

³ *Rex v. The Inhabitants of Herndon-on-the-Hill*, 4 M. & Sel., 565. A license to lay an aqueduct across the land of the licensor may be revoked, and may be cut off. See *Owens v. Field*, 12 Allen (Mass.), 457; *Babcock v. Utter*, 1

Abb. (N. Y.) App. Dec., 27; *St. Vincent Orphan Asylum v. Troy*, 76 N. Y., 108; *Wiseman v. Luck-singer*, 84 id., 31.

⁴ *Houston v. Laffee*, 46 N. H., 505; *Pratt v. Ogden*, 34 N. Y., 20; *Arrington v. Larrabee*, 10 Cush. (Mass.), 512; *Wood on Frauds*, 8.

⁵ 10 N. Y., 115; 2 R. S., 334, sec. 1; *Kingsley v. Holbrook*, 45 N. H., 313; *Buck v. Pickwell*, 27 Vt., 157; *Yeakle v. Jacob*, 32 Penn. St., 376; *Scovill v. Boxall*, 1 Young & Jer. (Ex.), 396; *Teal v. Auty*, 2 Brod. & Bing., 99.

farm occupied by him as tenant. The defendant had cut and sold, for his own benefit, a quantity of trees growing upon the premises. Some evidence was offered showing that it was agreed that the defendant might clear the trees if he would seed down the land that he cleared. This testimony was objected to by the plaintiff; the court overruled the objection, and held that it was competent to give in evidence a parol agreement mutually beneficial to the parties, by which the wood was to be cut and the land seeded. The plaintiff excepted and appealed.

In the court of appeals it was decided that the exception was well taken.

Edwards, J., further said: "It is not pretended that all the wood cut down was required for fences or repairs of the buildings, or for any other purpose for which it might be legally used by the tenant. Under these circumstances, I think that the clearing of the wood-land was in itself an act of waste, and whether it was so or not is a question of law to be decided by the court."

Denio, J., as to a license, said: "The object of the qualification respecting the evidence of a license is the same with those provisions of the statute of frauds requiring certain transactions to be put in writing, namely, to prevent agreements from being set up by false or mistaken oral testimony."

The distinction between a privilege or easement carrying an interest in land, said Chancellor Kent, and requiring a writing within the statute of frauds to support it, and a license which may be by parol, is quite subtle, and it becomes difficult in some of the cases to discern a substantial difference between them.¹

§ 211. The case of *Johnson v. Wilkinson*² illustrates the question as to what is to be deemed a *license* and what an interest in land. There the defendant, who was the owner of a hall, made an oral contract with the plaintiff by which

¹ 3 Kent's Com., 452; *Taylor v. Waters*, 7 Taunt., 374. ² 139 Mass., 3.

he agreed to permit the plaintiff to use the hall for dancing purposes on the afternoons of four certain days, at a stipulated price for each afternoon.

In the court below a verdict was directed for the defendant upon the ground that the contract was within the statute of frauds, and was for the sale of an interest in land.

On the appeal the questions discussed were whether there was a contract for the sale of an interest in land, or for a license to use the hall.

A license, substantially said Morton, C. J., is a permission or authority to enter the land and do certain acts, or series of acts, the parties not intending to convey any interest in the land. It is well settled that such a license need not be in writing, under the statute of frauds.

Hence, a license to enter land and to cut timber or to gather the growing crop is valid, though not in writing.

Judgment was given for the plaintiff for breach of contract against the owner of the building.

So it has been held that where a person sows a crop on the land of another, under a parol license, he is entitled to the crop arising therefrom.¹

So an agreement for lodgings in a hotel creates merely a license, and not an interest in land;² likewise an agreement for a seat in a theater.³

§ 212. In *Banton v. Shorey*⁴ the plaintiff claimed title to certain timber as mortgagee of real estate from one Hatcil Gott, dated November 10, 1881, but not recorded until January 12, 1883.

The defendants claimed the title thereto by virtue of the following memorandum:

“ALTON, September 24, 1882.

“This is to certify that Frank Porter, of Alton, has bought

¹ *Harris v. Frink*, 49 N. Y., 24; ³ *McCrea v. Marsh*, 12 Gray, 211; *McLeod v. Jones*, 105 Mass., 403; *Burton v. Scherpf*, 1 Allen, 133.
Wood v. Manley, 11 A. & E., 34. ⁴ 77 Me., 48 (1885).

² *White v. Maynard*, 111 Mass.,
250.

four hundred knees, more or less, of me, Hatcil Gott, on lot No. 25, and has paid me in full, \$70 (seventy dollars).

“HATCIL GOTT.

“And this is to certify that I, Hatcil Gott, do defend the above writing.

HATCIL GOTT.”

The knees were severed from the soil, removed from the land, and the stipulated price paid for them by the defendants, before the plaintiffs' mortgage was recorded and before they had any notice of it. The defendants claimed as purchasers without notice of an adverse interest in any one till after the knees had been severed from the land and payment of the price stipulated.¹

The plaintiffs claimed that the defendants obtained no title to the knees, inasmuch as the trees from which they were taken were a part of the realty, and that their writing was not such an instrument as would convey an interest in real estate. The court assumes that it is settled by modern decisions “that parol or simple contracts for the sale of growing timber, to be cut and severed from the freehold by the vendee, with reference to the statute of frauds, and to give effect to them, have been construed as not intended by the parties to convey any interest in land, and, therefore, not within the statute. *They are held to be executory contracts for the sale of chattels, as they may be afterward severed from the real estate, with a license to enter on the land for the purpose of removal.*”² In this case the contract became executed. It is true the defendants, under the executory contract for the sale of growing timber, entered upon the land and severed therefrom and carried away the timber, paying the consideration named. Hence the title thereto became vested in the defendants.

“As between the vendor, the party in whom the title of

¹ Defendants invoked section 8 of the Revised Statutes, ch. 73. Parsons v. Smith, 5 Allen, 578; Davis v. Emery, 61 Me., 141; Freeman v. Underwood, 66 Me., 233;

² White v. Foster, 102 Mass., 378; Claflin v. Carpenter, 4 Met., 583; Ellis v. Clark, 110 Mass., 391. Poor v. Oakman, 104 Mass., 316;

record appeared," says the court, "and the vendees of this timber, the title thereto became vested in them when it was severed from the soil; to be sure, as to so much as might remain uncut, *the seller had the right, at any time before severance, to revoke the license to enter, sever and remove it*, and thereby prevent the vesting of the title to such as might remain uncut; but as to this timber which had been cut or severed from the soil, the contract had been executed, *the license irrevocable*, and the purchaser's title thereto valid. As to such *they were more than mere licensees; they were purchasers of property, with license incidental to an executed contract.*" The court decided that the title to the knees was in the defendants.

CHAPTER XI.

CONCERNING ICE AS GOODS.

- § 213. Ice held to be a manufacture when prepared for consumers.
214. The same subject continued.
215. Are incorporated ice companies manufacturing corporations so far as to avoid taxation; *The People v. The Knickerbocker Ice Company*.
216. Ice uncut is deemed personalty; *Higgins v. Kusterer*.

§ 213. Nice distinctions have been drawn in the cases in determining what will constitute a *manufacture* of goods.

According to linguistic authorities a manufacture is the process of making anything by art, or of reducing materials into form fit for use either by hand or machinery.

By a recent important decision the garnering and preparation of ice, fit for consumers of the article, is held to be a manufacture. The question, it must be admitted, falls pretty near the line.

It is a natural product; its natural condition is not changed.

“It is ice when it is taken from the river, and it is ice when delivered to consumers. The form alone is changed. It is reduced in size and delivered in quantities to suit the convenience of the patrons of the company.” Thus says Champlin, J., in the *Attorney General v. Belle Isle Ice Company*.¹

In the course of an able opinion he further says: “But it is not necessary to constitute the commodity a manufactured article that a chemical change should be wrought in the thing manufactured. Iron manufactured from iron-ore remains iron. Cotton gathered from the boll, and, by means of complicated machinery, manufactured, becomes

¹ 26 N. W. Reporter, 311, Michigan, S. C., January, 1886.

the cotton of commerce. Lumber is manufactured from logs or timber, simply by changing its form."

§ 214. It has been held that grinding bones to produce the bone-dust of commerce was manufacturing, within the meaning of the revenue laws of the United States.¹

And the supreme court of the United States held that timber split into staves, or into long pieces designed for shovel handles, was "manufactured," and not covered by the reciprocity treaty of 1854.²

"Speaking for myself, however," says the learned justice in the Michigan case, "I must say that if this were a proceeding under sections 8646 and 8647, to test the right of the Belle Isle Ice Company to carry on the business set forth in the replication, I should not consider that business a manufacturing business within the meaning of the law, for reasons which are set forth in the opinion of Mr. Justice Danforth in the case of *People v. Knickerbocker Ice Company*,³ and to my mind very satisfactory.

§ 215. On the other hand, an incorporated ice company has been held not to be a manufacturing corporation.

The *People v. The Knickerbocker Ice Company*⁴ was an action brought to recover state taxes, and for the penalty prescribed for their non-payment. The answer set up that the defendant "is a manufacturing corporation," etc., under the laws of 1848, and the amendment passed in 1855.⁵ The business of the defendant was that of collecting ice from

¹ *Schriefer v. Wood*, 5 Blatchf. R., 215.

² *United States v. Hathaway*, 4 Wall. R., 404, 408.

³ 99 N. Y. R., 181. As to whether there can be absolute property in ice or water, the following cases will be found interesting: In *Marshall v. Peters*, 12 How. Pr., 218, a right of injunction against cutting ice, etc., was denied. *Cummings v. Barrett*, 10 Cush., 189; *Mill River Mfg. Co. v. Smith*, 34 Conn., 462; *Ward v. The People*, 6 Hill,

146; *Edgerton v. Huff*, 26 Ind., 35.

The owner of the fee may take ice from the canal if it does not interfere with the rights of navigation. *The State v. Pottmeyer*, 33 id., 402; *Storm v. Mauchaug*, 13 Allen, 10; *Paine v. Woods*, 108 Mass., 173; *Myer v. Whitaker*, 18 Alb. L. J., 128; *Lorman v. Benson*, 8 Mich., 32; *Rendskopf v. De Ruyter*, 39 Mich., 1.

⁴ 99 N. Y., 181.

⁵ See *Laws of New York*, 1855, ch. 301.

the Hudson river and Rockland lake, storing, preserving and preparing it for sale, etc.

The referee found that the defendant was *not* a manufacturing corporation carrying on manufacture.

The court, Danforth, J., in an able opinion, after saying that the defendant's operations are in no way concerned with the manufacture or sale of an artificial product, observes: "Its dealing is with *ice* as an existing article, not the manufacture or production of ice by combination of materials, or the application of forces or otherwise. It collects, stores and preserves that which natural causes created and which other natural causes would destroy and waste. It seeks only to hold these last in check. Similar operations would equally apply to water, fruit, sand, gravel, coal and other natural productions. . . . No doubt ice may be manufactured, and frigorific effects produced by artificial means. Corporations exist for the purpose and come literally within our manufacturing laws. Their methods in no respect resemble those of the defendant." He further says, referring to the act of 1855, "equality under that act is provided for, but nothing more. Exemption from taxation is not given by it. That subject is regulated by the statute under which the action is brought,¹ and it is limited to corporations which are in fact manufacturing corporations, and do carry on manufacture. We think the defendant is of a different character." All the judges concurring, the judgment appealed from was affirmed.²

§ 216. The case of *Higgins v. Kusterer*³ presents the question whether ice is personalty or whether it belongs to

¹ Laws of 1881, ch. 361, § 2.

² See *Nassau G. L. Co. v. Brooklyn*, 89 N. Y., 410; *People v. New York Floating Dry Dock Co.*, 92 id., 487. In general the term "manufacture" presupposes a raw material; application thereto of skill and manipulation, and the production of a new distinct object due to such application. See *Byers*

v. Franklin Coal Co., 106 Mass., 181; *Dudley v. Jamaica P. Aqueduct*, 100 id., 183; *Frazee v. Moffit*, 20 Blatchf., 267. See, also, *Schrieffer v. Wood*, 5 Blatchf., 215; 28 Alb. L. Jour., 366; *Bailey v. Schell*, 5 Blatchf., 195; *Lawrence v. Allen*, 7 How. (U. S.), 1785.

³ 41 Mich., 322.

the realty. There, certain ice was formed upon water which had spread over a spot of low ground partly belonging to one Coats; the land being dry in summer. After the ice formed in February, 1878, Coats by a parol bargain sold all the ice in his part of the basin to the plaintiff. The parties at the time stood by in view of the ice, and the quantity sold was pointed out and the price paid. The ice at the time was uncut. About two weeks thereafter, John Loder, knowing that Higgins, the plaintiff, had purchased and claimed the ice, and having been warned thereof by Coats, offered Coats \$5 for the ice, which Coats accepted, and Loder cut it and sold it to Kusterer, who had made a previous verbal contract with Loder for it. The plaintiff was present when the ice was loaded on Kusterer's sleigh and forbade the loading and removal, on the ground that he had purchased it from Coats. Kusterer referred the matter to Coats, who said he had sold it to Loder. Both Loder and Kusterer had full notice of the claims of Higgins before they expended any money. It was not like crops or fruit connected with the soil by roots or trees through which they gained nourishment before maturity. It was only the product of running water, a portion of which became fixed by freezing, and if not removed in that condition would lose its identity by melting. In its frozen condition it drew nothing from the land, and got no more support from it than a log floating on the water would have had.

The court said: "While we think there can be no doubt that the original title to ice must be in the possessor of the water where it is formed, and while it would pass with that possession, yet it seems absurd to hold that a product which can have no use or value except as it is taken away from the water, and which may at any time be removed from the freehold by the moving of the water, or lose existence entirely by melting, should be classed as realty instead of personalty, when the owner of the freehold chooses to sell it by itself. When once severed no skill can again join it to the realty. It has no more organic connection

with the estate than anything else has that floats upon the water. Any breakage may sweep it down the stream, and thus cut off the property of the freeholder. It has less permanence than any crop that is raised upon the land, and its detention in any particular spot is liable to be broken by many accidents. It must be gathered while fixed in place or not at all, and can only be kept in existence by cold weather.

"In the present case, the peculiar situation of the pond rendered it likely that the ice could not float away until nearly destroyed, but it could not be preserved from the other risks and incidents of its precarious existence. Any storm or shock might in a moment convert it into floating masses which no ingenuity of black-letter metaphysics could annex to the freehold."

After further discussing the ephemeral character of ice, and the common law principle of treating nothing moveable as realty unless either permanently or organically connected with the land, the learned judge concludes that it should be dealt with in law according to its uses in fact, and that any sale of ice ready formed, *as a distinct commodity*, should be held a sale of *personalty, whether in the water or out of the water*.¹

This decision seems to be in accordance with reason and common sense and fairly presents the question what should be denominated personalty and what realty.

¹ In *State v. Pottmeyer*, 33 Ind., 402, however, it was substantially held that ice formed of water in its natural channel constitutes a part of the land and belongs to the owner of the bed of the stream. He has the right to prevent its removal. Ray, Ch. J., held that water is included in the term land. See Washburne on Real Prop., b. 3, ch. 4, § 3; *Brace v. Yale*, 10 Allen, 441; Bouv. Dic., title "Pond." "If water in a pool upon one's land be part of the realty, because fixed

and stationary, why is it not, when congealed over the bed of the stream, to the thread of which his title extends?" True, nature will in time, if it be not removed, again change the ice to fluid, and it will pass away from possession; but not more certainly than the changing winds and the rising tide will sweep away the shifting sands. See 2 Hilliard on Real Prop., 195, note a; *Mill River Manufacturing Company v. Smith*, 34 Conn., 462.

CHAPTER XII.

CONCERNING PRICE OR AMOUNT.

- § 217. The price an essential element; the rule of the civil law.
- 218. If the price is fixed it must be stated in the memorandum.
- 219. The English statute of frauds and Lord Tenterden's act.
- 220. The words "price" or "amount" in the statute of frauds of the several states.
- 221. The price must be payable in money.
- 222. The jury to fix the "price" in certain cases; a reasonable price.
- 223. Where goods are sold on "moderate terms."
- 224. When the order is silent as to price.
- 225. Certain deficiencies not to be supplied by parol proof.
- 226. Price must be mentioned, when.
- 227. Question of price when the goods have been accepted.
- 228. When the memorandum defective in not stating price.
- 229. When a special action on the case will lie.
- 230. Delivery defective unless price or quantity mentioned.
- 231. Jury to pass upon the question as to a mistake in the price.
- 232. Where price is fixed by valuers.
- 233. What is the market price.
- 234. What is a reasonable price.
- 235. Where several lots are purchased it is an entire contract and within the statute of frauds.
- 236. An illustration; *Baldey v. Parker*.
- 237. Rule where purchaser pays for some of the articles purchased and not for the others.
- 238. Illustration; *Aldrich v. Pyatt*.
- 239. Price may be recovered if purchaser assumes risk of delivery.
- 240. Where the price is uncertain.
- 241. Value estimated by the jury, when.
- 242. Consideration need not be expressed in the memorandum, when; the case of *Williams v. Robinson*.
- 243. In Oregon the consideration must be expressed in the agreement.

§ 217. The next subject for consideration is that of price or amount, in contracts for the sale of goods, wares or merchandise, chattels or things in action.

The price or amount is an essential element if it was a part of the contract.

By the civil law the *certainty of price* is a prerequisite to the validity of a contract of sale. The language of the Institutes is, *Pretium autem constitui oportet; nam nulla emptio sine pretio esse potest; sed et certum esse debet*. And Mr. Justice Story once said that this language of the civil law is the language of common sense.¹

While in general this rule of the civil law may be based upon common sense, under the decisions which have given construction to the statute of frauds, it can hardly be said that *without* a price being fixed there can be no purchase.

§ 218. If the price or amount can be made certain, or if a reasonable price is implied by the terms of the contract, the statute is satisfied.

It is a general rule that there is no valid contract until the price is settled between the parties. But it is deemed settled when the terms of the contract are so fixed as to be ascertained without any reference to the parties themselves.

While "price" implies money, it may be cash down or credit.

In *Maddock v. Stock*,² which was an action for damages for the non-delivery of certain wood, as shown by the declaration, Robinson, C. J., says: "It does not state the price to be paid for the wood, which is indispensable. If no price was in fact fixed, then the sale should have been averred to have been for a reasonable price, and it should have been averred what that reasonable price was."

Judgment was given on the demurrer.

§ 219. In the English statute of frauds (section 17), the words "the price of ten pounds sterling or upwards" occur; while Lord Tenterden's act, so-called, reads "value of ten pounds." The decisions in England hold that the word

¹ Lib. iii, tit. 24; *Flagg v. Mann*, ² 4 U. C. Q. B., 118.
² Sumner, 538.

“value” stands in the place of *price*. These statutes are to be read together.¹

It may reasonably be conjectured that the object of Lord Tenterden in substituting the word value for “price” was that when the parties have omitted to fix a price it may be open to a jury to ascertain the value in dispute. And so in general the cases have held.² And Lord Tenterden’s act, also, removed all uncertainty as to the statute of frauds including executory contracts.

§ 220. In the statute of frauds of some of the states there exist phraseological differences in respect to the “amount,” or “price,” at or beyond which the contract will be void without being evidenced by a memorandum in writing.³

In sixteen states⁴ (including Maryland and South Carolina, where the English statute of frauds exists intact), and in the territories of Arizona, Dakota, Montana and Wyoming, the statutory words are, “for the price of;” the Georgia statute reads, “to the amount of;” in Oregon the words are, “at a price not less than;” in Maine the words “for thirty dollars or more” are used; while in Florida, Iowa and Nebraska, no sum is mentioned in the statute of frauds.

¹ Harman v. Reeve, 18 Com. B., 587; Scott v. Eastern Counties Railway Company, 12 M. & W., 33.

² Hoadly v. McLaine, 10 Bing., 482, 488; Coleman v. Gibson, 1 Moody & Rob., 168.

³ In the statute of frauds of Arkansas, Maine, Missouri and New Jersey, the price or amount mentioned is \$30. In New Hampshire it is \$33; in Colorado, Connecticut, Dakota, Georgia, Indiana, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New York, Oregon, South Carolina, Wisconsin, Wyoming, \$50; and in California it is \$200.

⁴ Arkansas, § 2952; California, § 2794, subd. 4; Indiana, § 7; Massachusetts, § 5; Michigan, § 3; Minnesota, ch. 41, tit. 2, § 7; Missouri, § 6; Nevada, § 62; New Hampshire, § 14; New Jersey, § 6; New York, § 3, tit. 2; Vermont, § 982; Wisconsin, § 2307; Oregon, § 775, subd. 5; Dakota, § 626; Mississippi, § 2895; Montana, § 13; Nebraska, § 9; Utah, § 6; Wyoming, § 2. In Connecticut the statute of frauds reads, “sale of personal property for \$50 or upwards;” and the same general language is used in the statutes of Florida and Maine, except the amount.

§ 221. As already indicated the *price* or *amount* must be paid in money, or an obligation given to pay money, in order to constitute a valid contract of sale under the statute of frauds.

Hence, if any part of the price is paid down, though it be but a penny, or any portion of the goods delivered by way of earnest, which the civil law calls *arrha*, and interprets to be *emptiois venditionis contractæ argumentum*, the property of the goods is absolutely bound by it; and the vendee may recover the goods by action, as well as the vendor may the price of them.¹

§ 222. Where the language of the statute of frauds reads "to the amount of;" or, where no amount or price is mentioned, it is competent for the jury to fix the price or amount of the goods or chattels in controversy.

On the other hand, where the statutory words read, "for the price of," and no price is mentioned in the written memorandum, although the price was actually stipulated for in the bargain, it may be reasonably doubted whether the determination of the value or price can properly be left to the jury. The memorandum, in such case, is defective. On these questions, however, the decisions are somewhat variant.

For instance, in *Fuller v. Bean*,² it was held that, if the price can be made certain, it is sufficient. If the price is not expressly agreed upon at the time of the bargain, it may be determined by other means; the real value may be shown by evidence; and the law implies that the goods are to be paid for at what they are reasonably worth.³

§ 223. In *Ashcroft v. Morrin*,⁴ where the contract was to send specified quantities of porter and other malt liquors on

¹ Chase's Blackstone, 555.

² 34 N. H., 304.

³ *James v. Muir*, 33 Mich., 227; *Upton v. Winchester*, 106 Mass., 330; *Valpy v. Gibson*, 4 C. B., 887.

⁴ 4 M. & Gr., 450. See *Elmore v.*

Kingscote, 5 B. & C., 583. Where a variance as to quantity was held fatal, see *Churchill v. Wilkins*, 1 T. R., 447; but see *Laing v. Fidgeon*, 6 Taunt., 108; 4 Camp., 169; see, also, *Cross v. Eglin*, 2 B. & Adol.,

106.

“moderate terms,” the statement was held to be sufficient to satisfy the statute. In such a case it would be for the jury to determine the value, especially in England, where the statute (9 Geo. 4, ch. 14, sec. 7) uses the word “value” instead of *price*, and which act is there read in connection with the statute of frauds, 29 Car. 2.

§ 224. And in *Hoadley v. McLaine*,¹ where a landaulet was ordered without any price being mentioned, Tindal, C. J., observed that, as the contract was silent as to *price*, “the parties therefore leave it to the law to ascertain what the commodity contracted for is reasonably worth.”

§ 225. In general, it may be laid down as well settled, that, unless the statute provides that the *price* need not be stated in the memorandum, it is fatally defective if the price does not appear therein or in some of the writings constituting the same, especially if a price was agreed upon.

The price agreed to be paid constitutes a material part of the bargain, and should be stated in the memorandum to make the contract binding.

In *Stone v. Browning*,² Rapello, J., said of a letter, admitting the agreement to purchase: “It does not state the *price* or any of the terms of the contract. These deficiencies cannot be supplied by oral evidence. All the essential parts of the contract must be evidenced by the writing.” This is the safer rule.

§ 226. It was decided in *James v. Muir*³ that in an executory contract, where the words “for the price of” are used in the statute of frauds, the price must be mentioned in the memorandum.

That was an action growing out of the sale of timber. The court, Campbell, J., said: “Where goods are accepted,

¹ 10 Bing., 582.

² 68 N. Y., 604; *Newberry v. Wall*, 65 id., 484; *Session Laws of New York*, 1863; *Church v. Brown*, 21 N. Y., 331; *Wright v. Weeks*, 25 id., 159. In the last named case,

Allen, J., says, in cases not within the statute, parol evidence may be admissible, in aid of written agreements, and to give effect to them.

³ 33 Mich., 223.

and nothing has been said about the price, a reasonable price has been recognized as correct."

And, as he further substantially says, "it is laid down by some authorities, that where a contract is executory and not executed, unless the *price* is fixed distinctly according to some standard, either of amount, or of market, or of reasonableness, or some other method of ascertainment, the contract is incomplete, and the purchaser is not bound."

§ 227. In *Acebel v. Levy*,¹ it was in effect held that where a contract is silent as to price, and there is evidence of a parol contract as to price, a recovery could not be had on a *quantum valebat*, and that a contract in writing was as necessary for a reasonable price as any other. There an agreement was made for a cargo of nuts at their shipping price at Gijon, in Spain.

§ 228. In the case of *Vaupel v. Woodward*,² it was stated that under the old statute, if a party relied upon two separate writings to make out a contract, or upon a single after-writing, it was necessary that a complete contract should be made out; nor was parol evidence admissible to vary it. And that the written memorandum of the parties was totally defective if the *price* to be paid was not stated therein.

§ 229. *Fagan v. Faulkner*³ was an action of *assumpsit* to recover \$150 for five stacks of fodder, which it was alleged the defendant purchased and agreed to receive and pay for, but had refused to do so. Neither the *quantity* nor the *price* were agreed upon. "If he (defendant) really made such a bargain," says the court in that case, "and in consequence of the *non-fulfillment* of his engagement the plaintiff lost a sale of the property or suffered damage, she might have her special action on the case for consequential damages, but she could not maintain *indebitatus assumpsit*."

§ 230. So in *Rapelye v. Smith*,⁴ Woodworth, J., declared

¹ 10 Bing., 376.

⁴ 6 Cowen, 250; *Whitehouse v.*

² 3 N. Y. Leg. Obs., 132.

Frost, 12 East, 614; *Busk v. Davis*,

³ 5 Ark., 161; R. S. 1838, ch. 30. 2 Maule & Sel., 397.

the rule to be, and the principle runs through all the cases, that when something remains to be done as between the buyer and seller in relation to the subject of the sale, or for the purpose of ascertaining either the quantity or *price*, there is no delivery. Whether the question arises where the property is destroyed, or where the right of stoppage *in transitu* is drawn in question, cannot make any difference in the rule. The evidence must show an intention of the parties to make an absolute and complete sale.¹

§ 231. But where it is shown that there is a mistake as to the price, by reason of ignorance of the language, or from other reasonable cause, the question becomes one of fact for the jury to find whether the mistake had actually been made, as a test of the existence of a contract.

Thus, in *Phillips v. Bistoli*,² where a foreigner attended an auction sale and bid in certain earrings for the price of "eighty-eight guineas," and his defense was that he understood the bid made by him to be only "forty-eight guineas," and there was a mistake in thus knocking down the articles to him, Abbot, C. J., allowed the jury to pass upon the question *whether such a mistake actually occurred or not*.

§ 232. The authorities agree that the price contemplated by the statute of frauds must be money paid, or promised; and hence the sale may be for cash or on credit.

If the agreement be that the price of the article sold shall be fixed by valuers or appraisers, the parties are bound by such valuation or appraisal, and the price so fixed constitutes a part and parcel of the contract itself.³

¹ *Riddle v. Varum*, 20 Pick., 58; *Greene v. Bateman*, 2 Wood. & 280; *Draper v. Jones*, 11 Barb., 263; M., 359.

Whitwell v. Vincent, 4 Pick., 449. ³ *Fuller v. Bean*, 34 N. H., 301, 304; *Cunningham v. Ashbrook*, 20 Mo., 553; *Nutting v. Dickinson*, 8 Allen, 540; *Bass v. Velturn*, 28 Minn., 512; *Mason v. Phelps*, 48 Mich., 126; *McConnell v. Hughes*, 29 Wis., 537; *Easterlin v. Rylander*, 59 Ga., 292; *Hutton v. Moore*, 26

² B. & C., 511. See, also, *Cochrane v. Willis*, L. R., 1 Ch. App.,

§ 233. Where the contract is for the sale of an article at a *reasonable price*, if the article of sale is in the market and has a market value, there is no difference between its value and the market price, and the law adopts the latter as the proper evidence of value. And this is held to be so, not because value and price are really convertible terms, but only because they are ordinarily so in a fair market.

The market price, strictly speaking, is only an evidence of value; nor does it constitute a conclusive legal presumption of the fact.¹ It will be observed, also, that to make a market there must be buying and selling, purchase and sale.

§ 234. If the memorandum implies that the goods are to be a reasonable or moderate price, it is such a price as the jury upon the trial of the case shall decide as reasonable; and such price may or may not agree with the current price of the commodity at the port of shipment, at the precise time when such shipment was made.

§ 235. It may be stated as a general rule, deducible from the decisions, that if a person purchase successively at a stated sale several articles of less price than the amount mentioned in the statute of frauds, but when taken together they comprise a larger sum, it is an entire contract, and falls within the operation of the statute.²

A different rule, it has been held, prevails in successive lots sold at an auction.³

Ark., 382; *McLea v. Robinson*, 2 311; *Gault v. Brown*, 48 id., 185; *Pugsley & Burbridge* (N. B.), 83; *Messer v. Woodman*, 22 N. H., 172; *Brown v. Cole*, 45 Iowa, 601; *Woodburn Wheel Co. v. Philbrook*, 76 1 Chitty, Contr., 532; *Coffman v. Hampton*, 2 Watts & S., 377; *Tompkins v. Haas*, 2 Penn. St., 74; *Mills v. Hunt*, 20 Wend., 431; *Allard v. Greasert*, 61 N. Y., 1. See Wood on Statute of Frauds, §§ 288, 293; *Bal-
dey v. Parker*, 2 B. & C., 37.

¹ *Kountz v. Kirkpatrick*, 72 Penn. St., 376; *Brown v. Bellows*, 4 Pick., 189.

² *Jenness v. Wendell*, 51 N. H., 63. See, also, *Gilman v. Hill*, 36 id.,

³ *Wells v. Day*, 124 Mass., 38; *Emmerson v. Heelis*, 2 Taunt., 38; *Rugg v. Minett*, 11 East, 218; *Roots v. Lord Dormer*, 4 B. & Ad., 77. It

But in *Jenness v. Wendell*, *supra*, it was substantially held that a sale of household furniture, farming tools, and such like articles about a farm or a hotel, or where the sale also includes the stable stock, as it did in this case, or the farm stock and produce, there is ordinarily very little difference in fact between sales at an auction and a sale at any other place, or contracted in any other way, of several articles at an agreed price, which are all put together in one account.

To adopt any other construction of such a purchase would be a virtual repeal of the statute of frauds for all useful or practical purposes in a large amount of sales to which it has been understood as applying. And it was so held in *Mills v. Hunt*, *supra*.

§ 236. In *Baldey v. Parker*,¹ where the plaintiffs were linen drapers, and the defendant bargained for various articles, a separate price being agreed upon for each, and some of the goods were measured in the defendant's presence, and others he assisted in cutting from a larger bulk, and then directed an account of the whole to be sent to his residence (the bill of parcels sent amounting to more than 10*l.*), and he refused to accept them,—in the action the plaintiffs were nonsuited. On appeal it was decided to be an entire contract and within the statute of frauds. "Looking at the whole transaction," said Abbott, C. J., "I am of opinion that the parties must be considered to have one entire contract for the whole of the articles. The plaintiffs, therefore, cannot maintain this action unless they can show that the case is within the seventeenth section, the words of which are peculiar, 'Except the buyer shall accept part of the goods so sold and actually receive the same.' It would

may be somewhat difficult to reconcile *Jenness v. Wendell*, *supra*, with the English decisions.

¹ 2 B. & C., 37; Bayley, Holroyd and Best, JJ., concurred; Chitty on Contr. (11th Am. ed.), 532, 533; *Messer v. Woodman*, 22 N. H., 172,

177; *Jenness v. Wendell*, 51 N. H., 67. But see *Emmerson v. Heelis*, 2 Taunt., 38, where the opposite rule seems to have been maintained; and in *Hodgson v. Le Bret*, 1 Camp., 223.

be difficult to find words more distinctly denoting an actual transfer of the article from the seller, and an actual taking possession of it by the buyer. If we held that such a transfer and acceptance were complete in this case, it would seem to follow as a necessary consequence that the vendee might maintain trover without paying for the goods, and leave the vendor to his action for the price. Such a doctrine would be highly injurious to trade, and it is satisfactory to find that the law warrants us in saying that this transaction had no such effect.

§ 237. While it is well settled that where goods amounting in the aggregate to more than the sum stated in the statute of frauds are purchased at auction, in several parcels, upon distinct and separate bids, the whole will constitute but one contract, yet, on the other hand, if the purchaser pays for and takes a delivery of some of the separate articles only, leaving the residue undelivered and wholly unpaid for, or in such sales if the articles purchased are to be paid for on delivery and the purchaser afterwards receives and pays for some of the separate articles only, the case would be different.

On questions arising in regard to such sales, see note.¹

§ 238. In *Aldrich v. Pyatt*² the contract was by parol for the purchase of barley and apples, made at the same time, and was, as the court said, "a valid contract for the sale, both of the barley and the apples, independently of the statute of frauds."

Nothing was given or paid as earnest or part payment, either for the apples or the barley, but they were to be paid for respectively upon delivery.

The apples were subsequently delivered, accepted and paid for on the contract, and the question was whether such delivery took the case out of the statute in respect to the barley.

The court below, in effect, took the ground that the con-

¹ *Brown v. Hall*, 5 Lansing, 180; ² 64 Barb., 395.
Keeler v. Vandevere, id., 313.

tract was an entire one, and by the delivery of the apples the case was taken out of the statute. E. Darwin Smith, J., on the appeal, held that this was error. He said: "The articles sold were of different characters; they were to be delivered at different times and paid for respectively on delivery." The contract was to be executed "distributively," as was said by Judge Denio in respect to the hogs sold in the case of *Tipton v. Feitner*.¹

The judgment was reversed.

§ 239. It is well settled that if a purchaser assumes the risk of delivery of goods, and they are destroyed by flood or flame, the seller may recover the price thereof. So, also, if goods are sold and shipped, but by reason of the character of the articles, or the circumstances of the case, the aggregate amount must be ascertained by the vendee, and the risk of transportation is upon the buyer, and the goods are destroyed, the amount, as near as it can be, may be determined by the jury upon the evidence presented.²

§ 240. And it has been held in a celebrated case, that if at the time of the sale it is uncertain whether "a future crop of turnip-seed" would be of the *value* of 10% as per contract, and it did exceed that sum, the statute was applicable.³

§ 241. The true rule seems to have been stated in *Clarke v. Westrope*,⁴ that if the goods have been delivered the seller would be entitled to recover the *value* estimated by the jury, if the purchaser has done an act to render the valuation otherwise impossible.

§ 242. In general it seems to be held that it is not necessary that the consideration be expressed in the note or memorandum, unless the statute of frauds expressly provides that it must be.

In *Williams v. Robinson*,⁵ a case arising upon the sale of

¹ 20 N. Y., 425.

³ *Watts v. Friend*, 10 B. & C.,

² *McConnell v. Hughes*, 29 Wis., 446.

587; *Turley v. Bates*, 2 H. & C.,

⁴ 18 C. B., 765.

200; *Martineau v. Kitching*, L. R.,

⁵ 73 Me., 194; *Cummings v. Den-*

7 Q. B., 456.

nett, 26 Me., 397.

one hundred tons of ice, the court, Virgin, J., said that, "at common law, while every simple contract, whether oral or written, must be founded on a legal consideration, it need not be expressed in the writing itself, for parol evidence is admissible to prove it;" nor did the statute of frauds ever require the consideration to be recited in the note or memorandum.

Following the decisions in Massachusetts, the distinction between the fourth and seventeenth sections does not seem to have been followed in Maine. The court said, "the memorandum need not necessarily mention the consideration."

It seems even so generally to be held in agreements to answer for the debt or miscarriage of another.¹

§ 243. In Oregon, the statute of frauds provides that unless some note or memorandum, *expressing the consideration*, be in writing and subscribed by the party to be charged, the same shall be void.

Accordingly, under that statute, in *Corbitt v. Salem Gaslight Company*,² Prim, C. J., sustained the demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action.

The respondents brought the action for damages upon the following memorandum:

"*Portland, Oregon, December 16, 1875.* This is to certify that the Salem Gaslight Company will purchase from

¹ *Packard v. Richardson*, 17 Mass., 122; *Ellison v. Jackson*, 12 Cal., 542; *Reed on Stat. of Fr.*, note (m), § 427. By the statute of frauds of Massachusetts (section 3) it is provided that the consideration need not be stated in the memorandum, but may be proved by legal evidence. This proviso is not made expressly applicable to section 5, which relates to the sale of goods, etc., but the same rule would seem to apply to that section. So, in the English case, *Egerton v. Matthews*,

6 East, 307, it was decided that a memorandum of a bargain for the sale of goods, signed by the party to be charged, would take the contract out of the statute, *though the consideration be not expressed in the memorandum*. The above case has been considered quite irreconcilable with *Wain v. Warlters*, 5 East, 10, where the term "agreement" was involved.

² 6 Oregon, 405. See Gen. L. of Or., § 775.

Corbitt & Mackay, on arrival of ship from Sydney, Australia, due during the month of March, 1876, one hundred and fifty tons Newcastle coal, delivered at Salem, at \$14 per ton of two thousand two hundred and forty pounds. Payment, cash on delivery. (Signed) Salem Gaslight Company, per Miles M. Miller, Sec'y."

The court said: "The alleged agreement is one for the sale of personal property at a price not less than \$50, and there is no consideration expressed in the said writing, nor can any be inferred from anything that is expressed therein. . . . Many of the New York decisions hold that the consideration must be expressed in writing, under a statute which does not provide that the consideration must be expressed.

"Respondent having averred in his complaint that the alleged agreement was in writing, and having set it out in full, it cannot be presumed that it was in writing, as in the case of *Taylor v. Patterson*."¹

The court further held that, while a promise made by one party is a good consideration for a promise made by the other party, it must be concurrent and obligatory on both at the same time. And he held that the promise here was void.

¹ 5 Oregon, 123.

CHAPTER XIII.

CONCERNING ACCEPTANCE AND RECEIPT—OF ACCEPTANCE.

- § 244. What is meant by acceptance under the statute of frauds.
- 245. Language of the statute of the several states as to acceptance and receipt.
- 246. Distinction between "acceptance" and "receipt."
- 247. Acceptance in absence of a memorandum must be a substantial transfer of the property.
- 248. Complete acceptance precludes objections as to quantum or quality of goods.
- 249. A peculiar case of acceptance; *Ex parte Safford*.
- 250. Acceptance means physical acts, not words; *Dedrich v. Leonard*.
- 251. When may acceptance take place; option of purchaser; evidence of acceptance.
- 252. Illustration; *Gilman v. Hill*.
- 253. Constructive acceptance.
- 254. Words will not constitute acceptance; case of *Gardet v. Belknap*.
- 255. Another example; *Shindler v. Houston*.
- 256. Acceptance may be a question for the jury, or for the court.
- 257. A question of law or of fact.
- 258. Where there has been part acceptance.
- 259. So long as the purchaser can consistently object to the goods he has not accepted them.
- 260. Time of acceptance immaterial.
- 261. Acceptance may occur long after the contract; the case of *McKnight v. Dunlap*.
- 262. Acceptance by the vendee where the goods remain with the vendor; the case of *Rappleye v. Adees*.
- 263. The same subject; an example.
- 264. The same subject continued.
- 265. Where there has been no change of possession.
- 266. The same subject; *Tempest v. Fitzgerald*.
- 267. Where assumption of ownership was held to be acceptance.
- 268. A part acceptance; *Atherton v. Newhall*.
- 268a. Same subject continued; a Nebraska case.
- 269. The case of *Cooke v. Millard*.
- 270. The vendor may have implied authority to select goods for the vendee.

- § 271. Purchase of goods to arrive; not complete until acceptance.
- 272. Seller's dominion over the goods prevents acceptance.
- 273. Vendor may hold goods as bailee of vendee.
- 274. The case of *Brewster v. Taylor*.
- 275. Goods delivered at a place designated does not amount to an acceptance; *Jamison v. Simon*.
- 276. Acceptance ordinarily follows and precedes the assent of the seller.
- 277. Acceptance of more goods than were ordered takes the case out of the statute of frauds; the circumstances of the receipt and retention of bill of lading; *Amson v. Dreher*.
- 278. Case where no bill of lading was sent.
- 279. It is error to leave certain facts as to acceptance to the jury; *Scotten v. Sutter*.
- 280. Sending goods ordered by a route designated does not amount to acceptance of them.
- 281. Deductions as to the essentials to constitute acceptance.
- 282. Selling the goods is tantamount to acceptance.
- 282a. Purchaser has a reasonable time within which to accept; circumstances govern.

§ 244. The provision of the statute of frauds in relation to acceptance and actual receipt is one of the most important. Acceptance, as contemplated by the statute, is the assent by the buyer to a proposal by the seller that certain goods shall constitute a portion of the goods sold. In a word, it is *taking to the goods and approving*.

While the purpose and intention of this provision of the statute of frauds is to prevent false swearing, and by rendering proof in support of a contract more explicit and difficult it may tend to effectuate that end, it is also intended to fix the line of demarcation between the negotiation and the completion of the contract.

§ 245. While the language of the statute of frauds of the several states as to acceptance and receipt is somewhat different, the meaning is to the same general purport.

In substance the statutes read as follows:

(a) Unless the purchaser accepts or receives part of the goods sold.¹

¹ Maine, Vermont, Massachusetts, New York, Michigan; Minnesota buyer accepts and receives;" Idaho Territory the same. *Ne. v. Sutter*
 sota statute reads "unless the

(b) Shall accept and actually receive part of the property sold.¹

(c) Shall accept part of the goods sold and actually receive the same.²

(d) Shall accept or receive part of such goods, or the evidences, or some of them.³

(e) Shall accept the goods or part of them so sold and actually receive the same.⁴

(f) Unless the purchaser shall receive part of such property.⁵

(g) Where no part of the property is delivered, etc.⁶

Notwithstanding these phraseological differences, it is settled by a long line of decisions that *acceptance* and *actual receipt* of part of the goods sold are necessary in the absence of a memorandum in writing, or earnest, or part payment, to render the contract enforceable by law.

§ 246. For a long time after the statute of frauds was enacted the courts experienced considerable embarrassment in reaching a satisfactory determination as to the meaning of the words "acceptance" and "receipt."

In one English case⁷ doubt was expressed whether there was any real distinction between receipt and acceptance;

¹ Connecticut, New Hampshire, Oregon, Colorado, Nebraska.

² Arkansas, Georgia, Maryland, South Carolina.

³ California, Wisconsin, Nevada, Territories of Arizona, Dakota, Montana, Wyoming, and Washington.

⁴ Missouri, New Jersey, Florida.

⁵ Indiana.

⁶ The code of Iowa, sections 3663, 3664 (revised and annotated by ex-Chief Justice Miller, 1880), provides that "no evidence of the contracts," embracing contracts "in relation to the sale of *personal property* when no part of the prop-

erty is *delivered* and no part of the price is paid," is competent, "unless it be in writing and signed by the party charged or by his lawfully authorized agent." It will be observed that the word *accept* does not appear in the above statute of frauds. But it has been held that the danger of fraud is sufficiently guarded against by the use of the word "delivered." *Bullock v. Stcherge*, 13 Fed. Rep., 345, C. C. D., Ia. See, also, *Keiwert v. Meyer*, 62 Ind., 587; *Garfield v. Paris*, 96 U. S. Rep., 563.

⁷ *Castle v. Sworder*, 6 Hurl. & N., 832.

and in another case¹ the court was inclined to think that the person who inserted the words did not have a clear idea of the meaning of acceptance.

But the construction which attributes distinct meaning to the two expressions "acceptance" and "actual receipt" is now too clearly defined and settled to be considered as an open question. This is reasonably deducible from the decision in *Smith v. Hudson*,² *Benjamin on Sales*,³ and the authorities generally.

The distinction between *receiving* and *accepting* goods pursuant to an executory contract of sale is very satisfactorily discussed and stated in the case of *Bacon v. Eccles*,⁴ and some important cases are there cited.

§ 247. The act of acceptance in every case must be voluntary, reciprocal and unconditional.

The controlling principle running through all the cases and as laid down in treatises is, that, when the note or memorandum is dispensed with, the statute of frauds is not satisfied with anything short of physical acts of the parties; and that these acts must be tantamount to a transfer of the possession of the goods.

Upon these several points and the different phases under which they have arisen the cases cited in the note will be found interesting.⁵

§ 248. It should be steadily borne in mind that to constitute acceptance the vendee must receive the goods as

¹ *Marvin v. Wallis*, 6 E. & B., 726. *Brewster v. Taylor*, 63 id., 587; *Stone v. Browning*, 68 id., 598;

² 6 B. & S., 436. *Denmead v. Glass*, 30 Ga., 637; *De-*

³ §§ 139, 140. *hority v. Paxson*, 97 Ind., 253; *Bar-*

⁴ 43 Wis., 227. See, also, *Olson v. Mayer*, 56 id., 551; *Locke v. Williamson*, 40 id., 377. *Kuhns v. Gates*, 92 id., 67; *Fawcett v. Glossop*, 69 L. T., 287; *Pinkham v. Mattox*, 53 N. H., 600; *Prescott v. Locke*, 51 id., 94; *Sadler v. Whit-*

⁵ *Remick v. Sandford*, 120 Mass., 309; *Rodgers v. Jones*, 129 id., 420; *Goddard v. Demeritt*, 48 Me., 211; *Edwards v. Grand Trunk Railway Co.*, 48 id., 379; 54 id., 105; *Caulkins v. Hellman*, 47 N. Y., 449; *Clarkson v. Noble*, 2 Q. B. (Ont.), 361.

owner. His assumption of dominion over goods purchased is ordinarily very conclusive.

Not only must there be such a vesting of possession in the vendee as to destroy every lien for the price, as well as the right of stoppage *in transitu*, but the acceptance must be by acts so unequivocal as to preclude all objection to the quantum or quality of the goods.

It must also clearly appear that the vendee recognizes the binding obligation of the contract. When all these elements concur there has been such an acceptance as will render the contract enforceable by law.

Touching the principles laid down in this section, see note.¹

§ 249. As the facts appeared in *Ex parte Safford* — *Re Downing*,² the habit of Downing was to come to the warehouse of the petitioners frequently, and to buy entire “tannages,” as the lots from a single tannery are called, on a credit of sixty days. The leather was always weighed in his presence; the damaged hides were thrown out, the shrinkage agreed on, and his leather was piled up by itself, and marked with his name, and he sent for it when he pleased. Some of the leather so bought or selected had not been taken away from the petitioners’ store at the time of the great fire in Boston, November 9, 1872.

¹*Safford v. McDonough*, 120 Mass., 290; *Knight v. Mann*, 118 id., 143; *Townsend v. Hargraves*, id., 325; *Rodgers v. Phillips*, 40 N. Y., 524; *Marsh v. Rouse*, 44 id., 643; *Schultz v. Bradley*, 57 id., 646; *Van Woert v. Albany & Susquehanna Railroad*, 67 id., 538; *Markham v. Jandon*, 41 id., 235; *O'Donnell v. Brehen*, 7 Vroom (N. J.), 257; *Mathiessen and Weichers Reflector Company v. McMahon*, 9 id., 536; *Keiwert v. Meyer*, 62 Ind., 587; *Kirby v. Johnson*, 22 Mo., 354; *French v. Freeman*, 43 Vt., 93; *Gibbs v. Benjamin*, 45 id., 124; *Young v. Blaisdell*, 60 Me., 272; *Means v. Williams*, 37 id., 556; *Atwood v. Lucas*, 53 id., 508; *Hewes v. Jordan*, 39 Md., 472; *Hooker v. Knab*, 26 Wis., 511; *Simpson v. Krumdick*, 28 Minn., 355; *Finney v. Apgar*, 2 Vroom, 266; *Danforth v. Walker*, 40 Vt., 257; *Cooper v. Elston*, 7 T. R., 14, where the sample was no part of the goods; *Bush v. Holmes*, 53 Me., 417.

²2 Lowell's Dec., 563; 3 Low. Dec., 453.

The prime question presented in the case was whether the goods had been accepted and received by Downing within the meaning of the statute of frauds of Massachusetts.

Although the goods were marked with his name it did not appear that he was present at the time, and he was to take them when he pleased to send his carrier for them.

Lowell, J., said: "No delivery could be more complete, unless they had come into his personal possession; and I do not understand it to be denied that, at common law, the property would have passed."

After stating that the decisions upon the statute have introduced some refinements and that he did not intend to depart from those decisions, he says: "The authorities make the distinction between accepting goods and receiving them to be this: Goods may be constructively delivered, as to a carrier or warehouseman, and yet not accepted; if, for instance, they were ordered by word of mouth or bought by sample; and the carrier or warehouseman is not, as such, without special appointment, the agent of the buyer to ascertain that the goods conform to the order or to the sample; and, therefore, in such a case, the goods may be received and yet not accepted."

The facts in this case did not seem to bring the case within the rule that there can be no sufficient receipt by the vendee so long as the vendor holds as vendor, and insists upon his lien for the price.

The court further said, "the hides were delivered in an unequivocal manner;" and that with "all the refinements to which I have before alluded, I know of no case, either in England or the United States, in which such circumstances have not been considered evidence for the jury to find both acceptance and receipt to satisfy the statute." The debt against the estate was accordingly admitted to proof.

§ 250. In further illustration of the definition and meaning of acceptance and receipt as contemplated by the statute of frauds, the language of Learned, P. J., in *Dedrich v.*

Leonard,¹ will be found instructive. "These words," he says, "do not mean simply that the buyer is to express in words his satisfaction with the vendor's performance of the verbal agreement. They mean that he is to *do something* by which he shall actually accept as satisfactory, and receive into his possession, some part of the goods."

In that case the defendant solicited Dedrich to procure for him a quantity of hickory sticks; eight cords of the wood to be furnished at a point on Lake Champlain, at \$14 per cord, delivered. They were delivered at the place designated and measured by the defendant and plaintiff. Evidence was contradictory as to what was then said between the parties. The defendant testified that he told the plaintiff the timber was "unsuitable," and that he would not accept it. He had pleaded the statute of frauds.

It was held to be an agreement to *sell* and therefore a void contract, and the judgment in favor of the plaintiff was reversed.

§ 251. It is well settled that acceptance may either precede, accompany, or follow the receipt of goods.

As already indicated, acceptance may be shown by proof of delivery by the vendor, with the intention of vesting the right of possession of the property in the vendee, together with the cognate rule that there must be an actual receipt by the vendee with the intention of taking to the possession as owner. And the burden of proof in all such cases is upon the party who sets up the contract.

It may also be said that acceptance will not be inferred as matter of law merely from the circumstance that the goods have come into the possession of the vendee. But it must be shown that the purchaser has exercised his option to receive the goods sold or not, or has done some act to deprive him of his option. Then the case is taken out of the statute of frauds and written evidence of the contract is dispensed with.

¹ 3 N. Y. State Rep., 730. See *Hallenbeck v. Cochran*, 20 Hun, 416.

In some cases it has been held that the acknowledgment of the alleged vendee to a third person, that he had purchased certain goods and offered to sell him half of them, where these facts are proved, was sufficient evidence that he had accepted the goods.¹

§ 252. For example, take the case of *Gilman v. Hill*.² There, a verbal contract was made whereby the plaintiffs were to have all the pelts that Gilman should take off between July and October, at fifty cents a piece, and that they might take them from time to time, as they were dried and fit for use.

As at the time of the bargain pelts amounting to \$40 had been taken off (which amount exceeded the statutory limit, "thirty-three dollars"), and the goods to that amount were then fit for delivery, acceptance and use, the contract was within the statute of frauds. The goods were *in esse*.

The plaintiffs were at liberty to take the pelts as they became suitable for use and as they should wish them.

There was no embarrassment in the case arising from the position that the property was not at the time of the contract in a condition to be the subject of delivery and acceptance. The question, therefore, was whether there had been either an acceptance of a part of the pelts, or part payment, so as to bind the bargain. The instructions given to the jury in the court below were that the goods must be shown to have been "delivered, accepted and received." A verdict was rendered for the plaintiff.

Eastman, J., decided that the evidence was competent to be submitted to the jury, and that therefrom they might

¹*Lemonier v. Charlebois*, 5 L. N., 196, S. C. 1882; *Munn v. Berger*, 4 L. N., 218, and 6 id., 363; 27 L. C. J., 349, Q. B.

²36 N. H., 311. See, also, *Marshall v. Ferguson*, 23 Cal., 65; *Gano v. The Chicago & Northwestern Railroad Company*, 66 Wis., 1; *Hawley v. Keeler*, 53 N. Y., 114; *Halterline v. Rice*, 62 Barb., 593; *Bowers v. Anderson*, 49 Georgia, 143; *Hinde v. Whitehouse*, 7 East, 558; *Hanson v. Armitage*, 5 B. & A., 680; *Scott v. Eastern Counties Railway Company*, 12 M. & W., 33; 7 Jur., 996.

find a delivery and acceptance of the eighty pelts on hand at the time of the contract.

It appeared that the pelts were counted by Gilman and one of the plaintiffs, on the day after the sale, and laid up in piles in the shed belonging to the other plaintiff, but nothing was said or done to indicate that they were not accepted.

"When we take into consideration the further fact," said the court, "that money and property had been received by Gilman from the plaintiffs to an amount exceeding the \$40, which was agreed at the time of the contract should be allowed toward the pelts, it appears to us that the intent of the parties was plain, and that the evidence taken together was competent to show a delivery and actual acceptance of the eighty pelts."

The purchaser had evidently exercised his option to receive the pelts sold, and that constituted an acceptance.

The judgment was affirmed.

§ 253. Implied or constructive acceptance has sometimes been declared insufficient, but it is now well settled that acceptance may be inferred as a fact from the surrounding circumstances.¹ The statute of frauds in regard to acceptance, when a party depends upon that to render the sale valid, as illustrated by the cases, requires that acts, and not words alone, should furnish the evidence of such acceptance. For words dwell only in the imperfect memory of witnesses, and are always liable to be misunderstood and misconstrued.

It is well settled that, while acceptance may include receipt, receipt does not include acceptance, but may be evidence of acceptance.² A promise on the part of the buyer

¹ *Menzies v. Dodd*, 19 Wis., 343. *Marsh v. Rouse*, 44 N. Y., 643; *Hewes*

² *Heermance v. Taylor*, 14 Hun, 149; *Blackburn on Sales*, 22; *Shepherd v. Pressey*, 32 N. H., 49; *Artcher v. Zeh*, 5 Hill, 200; *Jennings v. Webster*, 8 Cow., 256; *Chapman v. Searle*, 3 Pick., 38; *v. Jordan*, 39 Md., 472; see interesting opinion by Lord Denman, C. J., in *Curtis v. Pugh*, 10 Q. B., 111; *Acebel v. Levy*, 10 Bing., 376; *Johns v. Dodgson*, 2 Mees. & Wels., 656.

that he will take the goods at some future day will not constitute acceptance in any case.

§ 254. In *Gardet v. Belknap*,¹ as it appears in the case, the defendants called at the store of the plaintiff and verbally agreed to give him a stated price per gallon for a certain kind of brandy he had on hand, "in good casks;" and the plaintiff agreed that the defendants might have the brandy as soon as he could select the good casks and set them apart.

The evidence did not show that the brandy in such casks was ever separated from the other brandy in the plaintiff's store. Neither was a bill of sale made out, nor any mark put upon the brandy to designate it as belonging to the defendants; nor was any entry made in the plaintiff's books of the transaction, nor any note or memorandum in writing made of the contract. Some days after this agreement, the plaintiff's clerk called at the store of the defendants and one of them asked him if he could sell the brandy, to which he replied that he could, on account of the defendants, and then went away. The clerk called again the next day, when the defendants disputed the quantity which it was claimed they had agreed to take, but stated that they were ready to receive the quantity agreed upon, if the plaintiff could deliver it according to the agreement. The brandy was never removed from the plaintiff's store, but was, a few days thereafter, destroyed by fire. Upon these facts the defendants, at the trial court, moved for a nonsuit, which was denied. A verdict was rendered in favor of the plaintiff for \$1,780; and the defendants appealed. Bennett, J., said: "To hold that such a transaction amounted to a delivery within the statute of frauds *would be equivalent to a repeal of the statute*. The delivery must be such as the nature of the case admits. Wine may be delivered by giving up the keys of the wine cellar; and the consent of a party upon the spot is sufficient possession of a column of

¹ 11 California, 399.

granite, which, by its weight and magnitude, is not susceptible of any other delivery, and when the declared intention is to take possession. A bill of sale of timber, and materials of great bulk, or marking the timber, has been held such a delivery and change of possession as the subject-matter reasonably admitted."

While the authorities agree that the delivery may be according to the subject-matter, the property must always be placed under the control of the vendee.¹

In this case all that the plaintiff relied upon to make out a delivery was "words;" but clearly the statute requires more than that; it requires *acts*.

The judgment was reversed.

§ 255. In further illustration of the requirements under the statute of frauds, take the case of *Shindler v. Houston*.² The parties met where the plaintiff's lumber lay. The plaintiff said to the defendant, "What will you give for the plank?" The defendant answered, "Three cents a foot." The plaintiff asked, "What will you give for the scantling?" The defendant answered, "One and a half cents a foot." The plaintiff then said, "The lumber is yours."

If words, without acts, could operate to take any case out of the statute, it would be difficult to imagine a stronger state of facts to effect that purpose. But it was held that there was no delivery. Gardner, J., observed that "mere words are not sufficient;" and Bronson, J., said the statute "calls for acts."

§ 256. There may be an acceptance without receipt and there may be a receipt of goods without acceptance. And whether or not there has been an acceptance, as gathered from the acts and intention of the parties, is for the determi-

¹ 2 Kent's Comm., 500; *Tempest v. Fitzgerald*, 3 Barnwell & Ald., 680; *Jewett v. Warren*, 12 Mass., 301. A delivery order for goods sold on 'change, signed by the owner, drawn in favor of the

bearer, is a symbol sufficient to transfer title to the goods by delivery of the order. *Mueller v. Guye*, 12 Mo. App. Rep., 589.

² 1 N. Y., 261.

nation of the jury.¹ They are to deduce the ultimate fact from certain probative facts by a process of natural reasoning. A presumption of fact is said to be the natural connection of one fact with others by a combined process of proof and argument.

On the other hand, it is the province of the court to withhold the facts from the jury, when they are not sufficient to warrant the finding of an acceptance; and also to say whether there is evidence of a constructive delivery sufficient to satisfy the statute of frauds.²

Such a conclusion of law is the result of artificial reasoning, and this is often in exact accord with natural reason. And the result reached by a presumption of law may be a fact equally with that attained by a deduction of the same fact from the existence of other and evidentiary facts. Hence, it has also been held, that if, from the facts in evidence, the result can be reached by that process of natural reasoning adopted in the investigation of truth, it becomes an ultimate fact, to be found as such.

If, on the other hand, resort must be had to the artificial process of the law, in order to reach a final determination, the result is a conclusion of law.³

§ 257. Courts are often called upon to draw nice distinctions in determining whether there has been an acceptance, and whether the case should be withheld from the jury.

When the law can pronounce upon the facts, whether there has been an acceptance, the question becomes one of law; but in other cases, the question of law may depend upon the conclusion of the jury upon the facts proved.

¹ *Stone v. Browning*, 68 N. Y., 604; *Ga.*, 633; *Denny v. Williams*, 5 *Sawyer v. Nichols*, 40 Me., 212; *Allen*, 5; *Howard v. Borden*, 13 id., 299; *Tower v. Tudhope*, 37 U. C. Q. B., 200; *Kealy v. Tenant*, 13 Ir. C. L. R., 394.
² *Dyer v. Libby*, 61 id., 45; *Chaffin v. Doud*, 14 Cal., 384; *Stevens v. Stewart*, 3 id., 149; *Garfield v. Paris*, 96 U. S., 557; *Borrowdale v. Bosworth*, 99 Mass., 381; *Wartman v. Breed*, 117 Mass., 18.

³ *Levins v. Rovegus*, — Cal., — (1886), Sup. Ct. of California, —; *Pacific Rep.*, —; 1 *Greenl. on Ev.*, §§ 44, 48; *Burrill on Circum. Ev.*, 52.

² *Pinkham v. Mattox*, 53 N. H., 604; *Phillips v. Ocmulgee Mills*, 55

In general it is held that if the evidence be so slight that the court would be bound to set aside any number of verdicts, finding an acceptance, that should be rendered upon it, *toties quoties*, it is the duty of the court to withhold the case from the jury. And this duty may arise even in cases where the court might admit that there was a *scintilla* of evidence tending to show an acceptance, but not enough to warrant such finding.¹

The acceptance and receipt requisite to dispense with the memorandum in writing to satisfy the statute implies more than an action of the mind or mere words.

§ 258. While the courts have experienced some embarrassment in determining what acts will constitute an acceptance, it is now well settled that the acceptance and receipt of a part of the goods, whether by sample or otherwise, does not obligate the buyer to take the rest of the goods, *unless they correspond in kind and quality to the contract*.

The acceptance and receipt of goods, in order to render a written contract unnecessary under the statute, are not such an acceptance and receipt as will preclude the vendee from questioning the kind or quality of the goods, or of disputing the fact of the performance of the contract. The buyer is entitled to the opportunity of deciding whether or not the goods correspond with the order or sample.²

¹ Browne on Statute of Frauds, sec. 321; Gray v. Davis, 10 N. Y., 293; Corning v. Colt, 5 Wend., 253; Hilliard on Sales, 135, and cases cited. And see Elmore v. Stone, 1 Taunt. R., 458, where an exception to the rule seems to be stated; and questioned in Howe v. Palmer, 3 Barn. & Ald., 324; and Proctor v. Jones, 2 Carr. & P., 534; Duplex Safety Boiler Company v. McGuinness, 64 How. Pr. R., 99 (1882).

² Stone v. Browning, 68 N. Y., 604; 51 N. Y., 211; Caulkins v. Hellman, 47 id., 449; Beirne v. Dord, 5 id., 95; Hughes v. Jordan, 39 Md., 472; Lloyd v. Wright, 25 id., 215; Hausman v. Nye, 62 Ind., 491; Dows v. Montgomery, 5 Robt., 445; Kellogg v. Witherhead, 6 Sup. Ct. R. (T. & C.), 525; Morton v. Tibbett, 15 Q. B., 428; Bushell v. Wheeler, 15 id., 442; Hunt v. Hecht, 8 Ex., 814; Cusack v. Robinson, 1 Best & S., 299; Norman v. Phillips, 14 M. & W., 277; Hopton v. McCarthy, 10 L. R. Ir., 266; Blackburn on Sales, 22, 23; Pierson v. Crooks, 4 N. Y. State R., 578; Gurney v. Atlantic, etc., Railway Co., 58 N. Y., 358.

The right of inspection and examination preceding the obligation to accept the property is maintained by all the authorities where the sale is executory, and the property itself is unascertained or separated.

§ 259. If goods of a particular description are ordered to be sent by a carrier, the buyer must in every case receive the package to see whether it answers his order or not; it may even be reasonable to try part of the goods by using them; but though this is a very actual receipt, it is no acceptance so long as the buyer can consistently object to the goods as not answering his order.

In all such cases, if the buyer has exercised his option to accept and actually receive the goods, or has done something in regard to the goods to deprive him of his option, it will be deemed an acceptance.¹

Thus, in *Norman v. Phillips*,² the plaintiff received a verbal order from the defendants for certain goods to be sent to them by an agreed-upon route. The invoice was forwarded at the same time, but it was immediately returned by the defendants with a letter stating that it did not correspond with the contract, and they refused to accept the goods. It was held that there was no evidence of an acceptance and actual receipt of the goods by the defendants sufficient to satisfy the statute, and that the plaintiff could not recover the price.

§ 260. In general, the statute of frauds does not require that the acceptance of goods shall take place *at the time* of the parol contract of sale.

But the decisions hold that a subsequent acceptance of part of the goods sold, where the intention is to vest the right of possession of the whole in the buyer, renders the contract valid. The time of acceptance is immaterial.

§ 261. The Revised Statutes of New York (1830) modified the original clause of the statute of frauds of that state

¹*Hill v. McDonald*, 17 Wis., 97; Wis., 227; *Smith v. Stoller*, 26 Mason v. H. Whitbeck Co., 35 Wis., 671.
Wis., 164; *Bacon v. Eccles*, 43 ²14 M. & W., 277.

relating to sales of goods, etc., in this: It requires a part payment "at the time" of the making of the contract. But in that state acceptance may be after the contract is made. The statute does not specify when either the goods are to be accepted or received.¹ The statute has received definitive judicial construction.

In the case of *Sprague v. Blake*,² Cowen, J., decided that a subsequent acceptance, in whole or in part, of the goods agreed to be sold, renders the contract valid; but in *Seymour v. Davis*³ the opposite doctrine was enunciated. This mooted question was finally set at rest by the able decision of Paige, J., in the court of appeals, in *McKnight v. Dunlap*.⁴ There it was decided that a verbal contract for the sale of goods, exceeding \$50 in price, is valid if a part of the same has been delivered to and accepted by the purchaser under the contract, although such delivery and acceptance took place several months after the making of the contract. There the contract was made in June, for the sale of five thousand bushels of malt; one thousand four hundred bushels were delivered and accepted in August and September following. An oral contract may be considered good as a proposition, and a subsequent delivery and acceptance of a part or the whole of the goods as an acceptance of the proposition and conclusion of a verbal contract.

§ 262. Where the goods remain in the possession of the vendor, although there has been a complete acceptance and receipt by the vendee, it must be under circumstances which clearly show that the vendor holds as agent or bailee, and that he has relinquished all claim to the goods. It must be tantamount to an actual receipt.

¹ Notes of the Revisers, 3 R. S., 2d ed., 656, 657. validated by a tender and acceptance afterwards. *Jackson v. Hubbard*, 36 id., 10; *McCarthy v. Nash*,

² 20 Wend., 61 (1838).

³ 2 Sandf. S. C. R., 245 (1848).

⁴ 1 Seld. (N. Y.), 537 (1851). See *Buckingham v. Osborne*, 44 Conn., 134, where it is held that a contract of sale of goods, inoperative under the statute for want of delivery, is

14 Minn., 127; *Gaston v. Penney*, 24 id., 322; *Chaplin v. Rogers*, 1 East, 192; *Hawley v. Keeler*, 53 N. Y., 114; *Barnes v. Jevons*, 7 Carr. & P., 288.

In *Rappleye v. Adee*¹ there was an oral contract for the sale of twenty-five sheep. They were selected by the plaintiff out of the defendant's flock, marked with plaintiff's mark and put in a separate inclosure, the defendant agreeing to pasture them for eight or ten days. As the pasture-
age where they were placed was poor, it was agreed, a few hours after the contract was made, that the sheep might run with the others, and they were accordingly turned back with the flock. A note of \$16 held by the plaintiff was to be applied towards the purchase. The plaintiff did not have the note with him then, and the defendant agreed to send for it the same day. He did not do so, although the plaintiff, on his return home, drew a check for the balance of the purchase money and left it and the note with his wife to deliver to the defendant's servant as agreed.

The defendant sold and delivered the sheep to another person. The plaintiff thereupon tendered the note and check, and also the amount of the check in money, and demanded the sheep, which was refused.

The trial judge charged that, unless the sheep were actually delivered to and accepted by the plaintiff, the contract was void under the statute of frauds, and left that question to the jury. A verdict was rendered in favor of the plaintiff for the difference between the note and the price received by the defendant for the sheep.²

A new trial was denied. On appeal, the general term, E. Darwin Smith, J., sustained the ruling of the court below, holding that the evidence warranted the jury in finding a delivery and acceptance.

The circumstance that the sheep were selected and separated from the rest of defendant's flock, and the plaintiff's mark put upon them, and then, after such separation, it was agreed to let them run with the defendant's sheep for a few days, was a question of intention for the jury, relating as it

¹ 65 Barb., 589; 1 Sup. Ct. R. (T. Eng. Reporter, 3, decided July 31, 1885; 63 N. H., 397. But see

² See *Clark v. Labreche*, 1 New Vance v. Boynton, 8 Cal., 554.

did to the delivery and acceptance of the sheep. The acts of the vendee indicating the exercise of ownership is as properly submissible to the jury as evidence of receipt and acceptance.¹

§ 263. There may be found cases in the books in which the goods remain in the possession of the seller, and yet have been accepted and actually received by the buyer. It is settled that in such case the seller holds possession of the goods, not by virtue of his lien as seller, but under some new contract by which the relations of the parties are changed.

Thus, suppose a case like this: A. goes into the store of B. and selects certain goods at stated prices; the goods are placed in a till with a slip of paper pinned upon them containing the name of A. A. then goes away, nothing being said as to when or where the goods are to be delivered. A month afterwards B. meets A. and says to him: "I have a chance to sell part of your goods which were laid out for you. A. says "Sell them." B. accordingly does sell a part of the goods, and thereafter renders a bill to A. for the whole amount of the goods, crediting thereon the part sold. A. refuses to receive or pay for the goods so remaining.

Query: Is A. under the statute liable to B. for the amount?

Answer: A.'s conduct was such an exercise of ownership over the goods, by directing B. to "sell" a part of them, as that the relation of the parties had changed, and constituted an acceptance and receipt of the goods.² In so selling the part, B. acted as the agent of A.

¹Gray v. Davis, 10 N. Y., 285; important case of Walden v. Murdock, 23 Cal., 540, and McLaughlin v. Patterson, 32 Barb., 630; Evans v. Harris, 19 Barb., 416; Bissell v. Balcom, 39 N. Y., 275; 40 Barb., 98; Kirby v. Johnson, 22 Mo., 354; Malone v. Plato, 22 Cal., 108; Wytie v. Kelly, 41 Barb., 594; Brown v. Hall, 5 Lans., 177; Chapman v. Searle, 3 Pick., 38; Ely v. Ormsby, 12 Barb., 570. See the

²Safford v. McDonough, 120 Mass., 290; Janvrin v. Maxwell, 23 Wis., 51; Means v. Williamson, 37 Me., 556; Pinkham v. Mattox, 53 N. H., 600; Marsh v. Rouse, 44 N. Y., 643; Young v. Blaisdell, 60 Me., 272; Green v. Merriam, 28 Vt.,

§ 264. *Lansing v. Turner*¹ was an action on the case for breach of a contract in not delivering to the plaintiffs, in a good and merchantable condition, a quantity of beef.

The contract of purchase was made in the autumn; the consideration was paid in January following. The beef remained in the store of the defendants until the following summer, when it was found to be damaged.

The court held that the property in the goods was so far transferred upon the payment of the consideration money, that it was at the risk of the plaintiff. Clearly the acceptance was such as to remove all doubt as to the actual intention of the parties to the contract. Nor is there any principle better settled than that the goods may remain in the possession of the vendor, if he assume a changed character in regard to them, and yet be accepted and actually received by the vendee, thus converting the possession of the vendor into that of the vendee, through his agency.² Mr. Justice Blackstone lays down the principle that a bargain struck, and payment of the purchase money, vests the property in the goods in the vendee. As an illustration he puts the case of a horse dying while in possession of the vendor, after payment of the consideration. The loss, he says, must fall on the vendee.³

In all such cases the inference of law is that the vendor is a mere bailee, retaining the possession at the instance or request of the vendee. It may also be stated as well settled, that, to so vest the property in the thing in the vendee, there must be an actual or constructive delivery, and the latter may be inferred from the surrounding circumstances.

201; *French v. Freeman*, 43 Vt., 93; *Yale v. Seely*, 15 Vt., 221; *Conway v. Edwards*, 6 Nev., 190; *Armstrong v. Turner*, 49 Md., 590; *Bullard v. Waite*, 16 Gray, 57; *Shepherd v. Pressey*, 32 N. H., 49; *Castle v. Sworder*, 4 L. T. N. S., 868; 6 H. & N., 828; *Dennison v. Carnahan*, 1 E. D. Smith, 144; *Beaumont v. Bungeri*, 5 C. B., 301.

¹ 2 Johns., 16; *Bissell v. Balcom*, 49 Barb., 98.

² *Weld v. Carne*, 98 Mass., 152; *Barrett v. Goddard*, 3 Mason, 107; *Janvrin v. Maxwell*, 23 Wis., 51; *Hollenbecker v. Napier*, 3 Caines, 182.

³ 2 Bl. Com., 448; *Shep. Touchstone*, 224; *Bowers v. Anderson*, 49 Ga., 143.

§ 265. In *Vance v. Boynton*,¹ where H., the owner of barley which he had piled up in his corral, sold five hundred sacks thereof to V., who had it separated and marked "V." and piled up in another part of the corral, and employed a third person to take care of the same for him, and H. afterwards sold and delivered the same to B., it was held that B. was entitled to the property, the sale from H. to V. not being followed by an actual and continued change of possession. Here it would seem that there was a change of possession, and that the acceptance and delivery to B. was complete.

§ 266. In *Tempest v. Fitzgerald* ² there was an oral agreement in August to purchase a horse, then on the plaintiff's premises, and to fetch it away about September 27th.

The parties understood it was to be a ready-money bargain.

The defendant at the time was visiting at the plaintiff's house; he soon after left, and returned September 20th. He then directed the horse to be taken out of the stable; he and his servant, in turn, mounted, galloped and leaped the horse, and after they had so done his servant cleaned him. The defendant himself then gave directions that a roller should be taken off and a fresh one put on, and that a strap should be put upon his neck, which were accordingly done.

He then asked the plaintiff's son if he would keep the horse for another week. He said he would do it to oblige him.

The defendant then agreed to call and pay for the horse when he returned from the Doncaster races, about the 26th or 27th of September. He returned on the 27th, with the intention of taking the horse away, but it having died the day before, refused to pay the price for the animal.

Park, J., at the trial, left it to the jury to say if the defendant had exercised acts of ownership over the horse,

¹ 8 Cal., 554. See, also, *Lyle v. Shinnebarger*, 17 Mo. App., 67. ² 3 B. & Ad., 680.

and, if so, to find for the plaintiff. They gave judgment for the plaintiff. The defendant appealed. The court, Abbott, C. J., Bayley, Holroyd and Best, JJ., decided that there had been *no acceptance*. That the defendant had no right of property in the horse until the price was paid; and that until then he could not exercise any right of ownership, and if he had at that time ridden away with the horse, the plaintiff might have maintained trover.

§ 267. In the leading English case of *Marvin v. Wallis*,¹ a bargain was entered into for the sale and delivery of a horse. After the parol contract was made, the seller asked the buyer to lend the horse to him for a short time, which the buyer assented to, and the seller retained the animal for about two weeks, and then sent the horse to the buyer, but he refused to receive it.

There the court held that the assumption of ownership in thus "lending the horse" constituted a sufficient receipt and acceptance. That there had been a change of character in the seller from that of owner to that of bailee and agent of the buyer.

The plaintiff had judgment.

§ 268. The quite recent case of *Atherton v. Newhall*² presents the question as to what will constitute an acceptance and receipt of goods.

The plaintiffs were dealers in leather at Boston; the defendants were manufacturers of boots and shoes at Lynn. The defendants orally agreed to purchase "what leather was adapted to their purpose," being leather "light weight," to be selected from a certain lot of about "eight hundred sides," then in a pile in the plaintiffs' store.

After the defendants left the plaintiffs' store, the plaintiffs "sorted out" the leather intended for the defendants,

¹ 6 E. & B., 726; 25 L. J. Q. B., 369; *Oliphant v. Baker*, 5 Denio, 379; *Ely v. Ormsby*, 12 Barb., 570; *Green v. Merriam*, 28 Vt., 801; *Bullard v. Wait*, 16 Gray, 55; *Tuxworth v. Moore*, 9 Pick., 347; *Whipple v. Thayer*, 16 id., 28; *Carter v. Willard*, 19 id., 1; *Appleton v. Bancroft*, 10 Met., 236. But see *Phelps v. Hunnewell*, 4 Greenl., 376.

² 123 Mass., 141 (1877).

which comprised "six hundred and sixty sides," and had them put up into "forty-four rolls," the weight of each roll, and the name of the defendants' firm, being marked thereon. The rolls were then placed near the front door of the plaintiffs' store, ready for delivery. During the afternoon, on Saturday, an expressman who, before this transaction, had taken goods from the plaintiffs' store for delivery at Lynn, called, and took six rolls (ninety sides) of leather from the lot in question. The expressman had received no directions from any one to transport the leather to the defendants. He did not deliver the rolls so taken until the following Monday. On that day the plaintiffs' store, including the five hundred and seventy sides remaining, was burned (in the great Boston fire of November 9, 1872).

Two days afterwards one of the defendants called at the plaintiffs' store, produced the bill of "six hundred and sixty sides," and requested their book-keeper to correct it so as to cover only the leather actually received, and the book-keeper deducted *five hundred and seventy sides* from the bill. On the 20th of March, 1873, the defendants tendered to the plaintiffs \$394, the cost of the "ninety sides," which they refused to receive.

The plaintiffs sued for the full amount.

In the trial court it was ruled that upon these facts there was no evidence of delivery or acceptance of the "*five hundred and seventy sides*."

Judgment was for the defendants and the plaintiffs appealed.

Gray, C. J., considered it unnecessary to inquire whether there was a sufficient delivery to complete the sale, as it was clear, upon the authorities, that *there was not such an acceptance and receipt of part of the goods as to satisfy the statute of frauds*.

He held that an acceptance must be by the buyer himself or by some one authorized to accept for him.

"The acts of the buyer on Saturday," said the learned justice, "did not constitute such an acceptance, because, ac-

according to the seller's own testimony, the buyer merely agreed to take all the sides of leather of a certain thickness, which were not then set apart by themselves, but formed part of a large pile from which they were afterwards to be selected *by the seller*.”¹

The receipt of part of the leather by the expressman did not constitute such an acceptance, because he was not authorized to accept so as to bind the buyer.²

The acceptance by the buyer on Monday of the part delivered by the expressman was not a sufficient acceptance to take the sale of the whole out of the statute, because this was not done with the intention to perform the whole contract, and to assert the buyer's ownership under it; but on the contrary, he immediately informed the seller's clerk that he would be responsible only for the part received. The judgment was affirmed.

This is a succinct and clear exposition of the law on this subject.

§ 268*a*. In *Farmer v. Gray*³ the question of part acceptance was involved.

There the plaintiff purchased by sample of the defendants' agent goods amounting to about \$300. The defendants were grocers in Chicago. They shipped the goods, except one sack of rice, over the Rock Island & Pacific Railway to the plaintiff on the 15th of June, 1882, and on the 21st of that month they shipped the rice over the same route to the plaintiff. The goods first shipped were greatly damaged and partially destroyed in a cyclone at Grinnell, Iowa, and reached Lincoln, the plaintiff's place of business, in a

¹ See, on this point, *Knight v. Mann*, 118 Mass., 143; *Townsend v. Hargraves*, 118 id., 325, 333.

² *Johnson v. Cuttle*, 105 Mass., 447; *Kimberly v. Patchin*, 19 N. Y., 333; *Kein v. Tupper*, 52 N. Y., 550. In the early case, *Hart v. Sattley*, 3 Camp., 528, where goods were ordered verbally by a trader

in the country, of a merchant in London, the delivery of them by the seller to the carrier from whom the buyer had been in the habit of receiving goods, was held a sufficient delivery. But see *Hanson v. Armitage*, 5 B. & Ald., 557.

³ 16 Neb., 401.

bad condition, and the plaintiff refused to receive them. The rice was afterward received in good order and was paid for. The defense was that the goods did not correspond with the sample; and that the contract was verbal and no note or memorandum in writing was made of the sale. The court, Maxwell, J., decided that "the testimony showed that but one order was given for the goods, including the rice; that the order for the goods was entire. This being so, the acceptance of a part of the goods took the case out of the statute of frauds."

§ 269. One of the most authoritative cases involving this clause of the statute is *Cooke v. Millard*.¹

There the defendants visited the plaintiff's lumber-yard to purchase certain lumber. The lumber was of the desired quality, but had to be dressed, rabbetted and cut in sizes to suit the wants of the defendants. This the plaintiff agreed to do; and also agreed, when the lumber was ready for shipment, to notify one Percival, a forwarder, who, the defendants said, would transport it to them; all of which was done. Percival omitted to take the lumber on that day, and on the following morning it was destroyed by fire.

It was necessary, therefore, to determine whether the circumstances were sufficient to turn the executory contract of sale into an executed contract, independently of the statute; and also whether there was sufficient evidence of an acceptance and receipt to take the case out of the statute of frauds.

Dwight, C., said: "Under the facts the case seems to fall within the rule laid down by Mr. Blackburn, in his work on Sales,² that where, by the agreement, the vendor is to do something to the goods for the purpose of putting them into that state in which the purchaser is to be bound to accept them, or, as it is sometimes worded, into a deliverable

¹ 65 N. Y., 352.

² Blackburn on Sales, pp. 151, 152; 2 Kent's Com., 496. If goods are sold while mingled with others,

by number, weight or measure, the sale is incomplete until the bargained-for property is separated and identified.

state, the performance of these things shall, in the absence of circumstances indicating a contrary intention, be taken to be a condition precedent to the vesting of the property.¹

Proceeding on the view that an executory contract may pass into the class of executed sales by acts of subsequent appropriation, the justice further says that "if the subsequent acts of the seller, combined with evidence of intention on the part of the buyer, show that specific articles have been set apart in performance of the contract, they may be an executed sale and the property in the goods may pass to the purchaser."

§ 270. The doctrine as enunciated by Mr. Blackburn requires the assent of both parties, though it is not necessary that such assent should be given by the buyer subsequently to the appropriation by the vendor. It is enough that the minds of both parties acted upon the subject and assented to the selection.² Thus, in *Browne v. Hare*,³ it was said that the vendor may be vested with an implied authority by the vendee to make the selection and thus to vest the title in him; but such authority, ordinarily, would only be applicable where the chattels exist, and a mere selection from a mass of the same kind is requisite.

The principle of *Kein v. Tupper*⁴ was that the mere act of the seller in putting goods in a deliverable condition does not pass the title until the acceptance of them by the buyer. For a sale, contemplated by the statute, is not complete until the buyer has accepted as well as received the goods sold. But as already stated, there may be a receipt without an acceptance, and an acceptance without an actual receipt.

The court decided that the case came within the doctrine enunciated in *Shindler v. Houston*,⁵ and that there was no

¹ *Acraman v. Morrice*, 8 C. B., 885; *Calcutta* 449; *Gillett v. Hill*, 2 C. & M., 530; *Company v. De Mattos*, 33 L. J. (Q. B.), 214, in Ex. Chamber.
14 C. B. (N. S.), 412.

³ 3 H. & N., 484; S. C., 4 id.,

² *Blackburn on Sales*, 128; *Fra-* 822.

gano v. Long, 4 B. & C., 219; *Rohde* 452 N. Y., 550, and cases cited.

v. Thwaites, 6 id., 383; *Aldridge v.* 51 N. Y., 261.

sufficient act of the parties amounting to a transfer of the possession of the lumber to the buyer and an acceptance by him.

§ 271. In *Clark v. Labreche*,¹ the defendant, through the plaintiffs' agent, verbally ordered certain crockery, which was to be imported by the plaintiffs, at Boston, and to be sent to the defendant at Manchester, New Hampshire. Nearly two months afterwards, the crockery not having arrived, the defendant wrote the plaintiffs not to send it until further orders, as he was having some repairs done in his store. Plaintiffs answered: "We will notify you when goods arrive and won't ship until you are ready." A week after this the defendant personally requested the plaintiff to keep the crockery for him until he directed it to be forwarded. The crockery arrived and was stored in the plaintiffs' warehouse.

Six weeks thereafter the plaintiffs' agent called on the defendant and asked him what he was going to do about the crockery. Defendant said he did not want it and they need not send it. On February 16, 1884, a month after this declination, the plaintiffs shipped the crockery by cars to the defendant, and at the same time sent him notice by mail that it was shipped, together with an itemized bill of it, amounting to \$245.97. Defendant refused to receive the crockery, and it remained in the railroad warehouse at Manchester.

Blodgett, J., decided that there was nothing in the case to show as matter of law that the plaintiffs acted as the defendant's agents or bailees in the storage and retention of the goods, or from which an acceptance could be implied against him. Although acceptance and receipt may be constructive only, all the cases agree that such acceptance and receipt must be proved by clear and unequivocal acts on the part of the buyer.

The test here was whether the acts of the defendant, done or undone, amounted in legal effect to a constructive

¹63 N. H., 397, decided in July, 1885. See, also, 1 N. E. Reporter, 3.

acceptance; for as the question is one of fact, it is only when the facts are not controverted, and afford plain and unequivocal evidence of the parties' intention, that the court will undertake to determine their legal effect. The court said: "Bearing in mind that no act of the seller alone, in however strict conformity to the terms of the contract, will satisfy the statute, and that the mere storage of goods by the seller, or their removal to a place appointed by the buyer, will not imply any acceptance of them by the latter,¹ it is obvious that, upon the facts to which reference has been had, the law does not imply an acceptance."

§ 272. Acceptance cannot legally take place in the absence of a specific agreement, so long as the seller preserves his dominion over the goods so far as to retain his lien for the price, for he thereby prevents the purchaser from accepting and receiving them as his own within the meaning of the statute;² and, consequently, if there is nothing indicating a surrender of the seller's lien, any acts of control by the buyer will not be an acceptance.³

§ 273. Where goods remain in the possession of the seller and still have been received and accepted by the buyer, the seller holds the goods as bailee or under some new contractual relation. It must also be under circumstances which expressly show that the seller has abandoned every claim to the goods.

§ 274. In *Brewster v. Taylor*⁴ an oral agreement was made for the purchase of a wagon at a stated price. It appeared in the case that the defendant at the time of the agreement told the plaintiff that he wanted a wagon for

¹ See *Shepherd v. Pressey*, 32 N. H., 55, and cases there cited; *Prescott v. Locke*, 51 N. H., 94, 103; *Hewes v. Jordan*, 39 Md., 472; 17 Am. Rep., 578; *Rodgers v. Phillips*, 40 N. Y., 531; *Maxwell v. Brown*, 39 Me., 98.

² *Browne on Stat. of Frauds*, § 317; *Benjamin on Sales*, 3d Am.

ed., 187; *Story on Sales*, 276; *Baldehy v. Parker*, 2 B. & C., 37, 44.

³ *Shepherd v. Pressey*, 32 N. H., 55; *Cusack v. Robinson*, 1 B. & S., 299; *Dodsley v. Varley*, 12 A. & E., 632.

⁴ 63 N. Y., 588; 39 N. Y. Super. (J. & S.), 159.

two horses, with a pole, and spoke of having a pole made, but they could not agree upon the price. The defendant then stated that he had a pole, and the plaintiff agreed to fit it to the wagon without extra charge, if he could do so without great expense. The pole could not be made to fit the wagon. The fitting of the pole was a material element in the original agreement of sale, and on that point the case mainly turned. The court held that there was no acceptance of the wagon, notwithstanding it was sent to the defendant's place without his knowledge, in an incomplete condition. The defendant had not accepted, nor was anyone authorized by him to accept the wagon, and therefore no sale was consummated within the meaning of the statute, and the case went out of court.¹

§ 275. Under the statute of frauds of California relating to contracts for the sale of "goods," etc., the words are that the contract shall not be valid unless "the buyer accepts and receives part of the thing sold."

The action of *Jamison v. Simon*² was for damages for an alleged breach of contract for the sale of a lot of wool, and the above mentioned section of the statute was involved. The contract was oral, nor was any part of the price paid at the time.

The agreement was that the wool should be delivered at the railroad depot at *Merced*. The defendant refused to accept the wool because, as alleged and shown by a letter which was put in evidence, the wool was damp. Within a few days after the defendant's refusal to accept the wool,

¹ See *Cross v. O'Donnell*, 44 N. Y., 661; *Roberts on Stat. of Frauds*, 180; *Story on Sales*, §§ 276, 278; *Dole v. Stimpson*, 31 Pick. (Mass.), 384; *Walrath v. Richie*, 5 Lans., 362; *Brand v. Focht*, 5 Abb. N. S., 225; affirmed in 3 *Keyes* (N. Y.), 409; *Finney v. Apgar*, 31 N. J. L., 266.

² 8 *Pacific Rep.*, 502; *Civil Code of Cal.*, § 1739, see on the same

point. *Hickok v. Buell*, 2 N. W. Rep., 512; 51 *Iowa*, 655; *Warfield v. Wisconsin Cranberry Company*, 19 N. W. Rep., 224; 63 *Iowa*, 312; *Ex parte Parker*, 9 N. W. Rep., 33; 11 *Nev.*, 309; *Bullock v. Stcherghi*, 13 *Fed. R.*, 345; *Galloway v. Week*, 12 N. W. Rep., 10; 54 *Wis.*, 604; *Hoffman v. King*, 58 *Wis.*, 314; 17 N. W. Rep., 136; *Carpenter v. Graham*, 42 *Mich.*, 191; 3 N. W. Rep., 974.

the plaintiffs sold the wool at *Merced*, at the highest obtainable price, and brought their action to recover the difference between the amount realized by the sale and the amount the wool would have paid at the price fixed by the oral contract with the defendant.

As acceptance was not proved, the court decided that the action could not be maintained.

§ 276. In the case of *United States Reflector Co. v. Rush-ton*,¹ Daly, C. J., says: "If a man goes into a store and selects a particular article of household furniture at a certain price, which he agrees to pay for when it is delivered, and the proof is that the particular article was delivered, it is, in the absence of evidence of any objection on his part, to be assumed that there was both a delivery and acceptance of the article within the meaning of the statute."

The same reasoning is followed by Willis, J., in *Bog Lead Mining Co. v. Montague*,² where it is said that, in order to constitute such a final and complete acceptance, the assent of the buyer should *follow*, not *precede*, that of the seller. But where the contract is for a specific ascertained chattel, "the reasoning is altogether different."

§ 277. It is well settled that if the vendee of goods, under an agreement otherwise void by the statute of frauds, *accepts a delivery* of the goods, or some part of them, either when the agreement is made or afterwards, the contract is rendered valid and binding. And the question whether there has been an acceptance of goods is properly to be submitted to the jury to ascertain the fact. An acceptance and receipt of goods, notwithstanding they amount to much more than was contemplated by the order for them, takes the case out of the statute of frauds.

Thus, take the case of *Amson v. Dreher*.³ There the plaintiffs were dealers in wine in New York; the defendant

¹ 7 Daly R., 410.

C.), 695; *McKnight v. Dunlap*, 5 N. Y., 537.

² 10 C. B. N. S., 481, 489. A subsequent delivery validates the sale. *Petrie v. Dorwin*, 4 Sup. Ct. (T. &

³ 35 Wis., 615.

had a beer garden in Milwaukee. Certain wine was ordered of the plaintiffs by the defendant. The former claimed that three casks were ordered, and the latter insisted that it was only one. Nothing was paid on account.

These casks of wine were shipped to the defendant by the plaintiffs, and a bill of lading thereof sent to him. The defendant refused to receive the wine, and it was left in store by the carrier. The wine was afterwards sold to pay charges. The testimony showed that while the wine was in Brigham's storehouse the defendant went there with the plaintiff and obtained a bill of the storage charges, but finding that he did not have money enough with him to pay the charges, promised to call again, pay the charges and take the wine.

Mr. Brigham testified that while the wine was at his place, two parties (and he thought the defendant was one of them) came there, talked about the charges, and, as he thought, went into the cellar and looked at the wine. This testimony being in, the defendant moved for a nonsuit, on the grounds that more wine was sent than ordered, and that the contract was void within the statute of frauds.

The defendant testified that he never agreed to receive the wine, and never went to Brigham's with either of the plaintiffs.

The part of the charge to the jury to which exception was taken was the following: "If it was understood between the parties that the delivery of the wine in the cellar of Mr. Brigham was to be a delivery of it, and that the defendant was to take it from there, that would constitute *a new agreement.*"

The court instructed the jury that the original contract was within the statute of frauds and therefore void.

Judgment was in favor of the plaintiffs, and the defendant appealed.

The supreme court, Lyon, J., held that there was no error in the instruction by the circuit judge, and the judgment was affirmed.

The circumstance that a bill of lading was sent to and retained by the defendant is of some weight, although not referred to by the court. As acceptance must be evidenced by *acts*, it would seem that the above case fell pretty near the line.

§ 278. Where A. at Syracuse, N. Y., entered into a contract with S. S. & Co., doing business in Minnesota, to manufacture certain boilers at stated prices, and deliver them on the cars at Syracuse by May 1, 1881, and to be paid for in notes on six, nine, twelve, fifteen and eighteen months, to be due at the date of each shipment, or at an average date to be agreed upon; and a large number of the boilers were shipped before the specified time and some after that time, duly marked with the name of the vendees, and a shipping bill delivered to the railroad company by which the boilers were shipped, and an invoice and bill of lading sent to the vendees; but on the following day, after the car was loaded and made up in a train, the defendant took possession of said boilers under an attachment against S. S. & Co., and the plaintiff informed S. S. & Co. by telegraph of the levy, and S. S. at once notified the plaintiff that as the boilers were not delivered according to contract they would not receive them, and the plaintiff thereupon commenced this action by replevin and retook the boilers and shipped them to his agent at Chicago, who afterwards sold them to S. S. & Co. under a new agreement, the court held that in the referee finding for the plaintiff he committed no error. For that S. S. & Co. had not subscribed any written contract, nor paid any part of the purchase money, nor was the carrier made the agent of S. S. & Co. to accept the boilers. But that if the bill of lading had been received by S. S. & Co., an acceptance might have been inferred as evidence of intent on the part of the vendor to deliver and the vendee to receive and accept; and as before its receipt the shipment was countermanded, that it could not be held that the title had passed out of the vendor until some evidence was shown of an acceptance by the vendee. The acceptance of

the bill of lading by the vendee would have changed the title, but it had not taken place. That there was not such a completed delivery or acceptance at the time the attachment was levied as to work a transfer of title from the vendor to the vendee.¹

The judgment was affirmed.

§ 279. The case of *Scotten v. Sutter*² is interesting. In *assumpsit* it was claimed by Sutter that Scotten had bargained with him for ten thousand "Ranger" cigars at \$25 per thousand, and five thousand "Hiawathas" at \$50 per thousand, part of which he afterwards refused to accept and pay for.

The evidence tended to show that the plaintiff had made the same brands before for the defendant, and no fault had been found with them; that four thousand of them were made, labeled with the defendant's labels, and sent to defendant's store, but were not then received, as the defendant was taking stock; that a large portion of the cigars were subsequently delivered, but the defendant declined to receive any more.

The defendant's evidence tended to show that no order was given for the cigars; that when a lot of the cigars were brought to the place of the defendant, they were sent back; that afterwards, upon being urged by the plaintiff, defendant consented to take the cigars as fast as he could sell them, and that the cigars taken were purchased under that agreement.

The court below charged that the contract for the cigars was invalid because not in writing, unless there was an acceptance by the defendant of part of the goods sold, or a payment by the defendant of the purchase money, or some of it, and that the sending by the defendant at three several times for portions of the cigars, and paying for them,

¹*Rodgers v. Phillips*, 40 N. Y., 188; *Baily v. Hudson River R. R.*, 519; *Krulder v. Ellison*, 47 N. Y., Co., 49 N. Y., 70 — distinguished. 36; *Caulkins v. Hellman*, 47 id., ²37 Mich., 526. 449; *Thompson v. Fargo*, 49 id.,

could not under the circumstances be construed as an acceptance of any portion of the goods under the contract. The jury found for the plaintiff. The defendant brought error.

Cooley, C. J., said: "The principal question on this record is whether the judge was correct in leaving it to the jury to find an acceptance of the cigars from what took place at the time the witness Compt took to the place of business of defendant the four thousand cigars in a hand-cart."

After reciting the fact of the four thousand cigars having been taken to the defendant, and what was then said by the defendant to Compt, who took the cigars to him, the learned judge says: "Now if the first promise was invalid because not in writing, the second promise, which was also not in writing, could be no better; it would be invalid on the same grounds precisely as the first."

After a further reviewal of the evidence, and after referring to the English and American cases touching the points involved in the case, the court decided that the judgment should be reversed and a new trial ordered.¹

§ 280. It appeared in *Hopton v. McCarthy*² that the defendant, an Irish trader, gave a verbal order for goods to the plaintiff, who carried on business in England, and the goods were sent by the route agreed upon between them. The invoice, sent at the same time, was at once returned with a letter stating that it did not correspond with the agreement, and notifying his refusal to take the goods. Upon these facts the court held that there was no evidence of any receipt and acceptance of the goods by the defendant, and that an action against him for the price would not lie.

In some cases it has been held that an acceptance by an agent is sufficient to satisfy the statute of frauds.³

¹ *Rohde v. Thwaites*, 6 B. & C., 388; *Turley v. Bates*, 2 H. & C., 200; *Lingham v. Eggleston*, 27 Mich., 324; *Wilkinson v. Holiday*, 33 id., 386; *Goddard v. Binney*, 115 Mass., 450.

² 10 Ir. L. R., 266.

³ *Barkley v. Rensselaer, etc., Railroad Company*, 71 N. Y., 205; *Silver v. Bowne*, 55 N. Y., 659.

But where an agent took possession of goods without authority to make a contract nor to accept, it was held to be not an acceptance by the vendee.¹

§ 281. As illustrated by the foregoing cases and authorities the following deductions may reasonably be drawn:

That to constitute an acceptance to satisfy the statute of frauds, the intention to perform the whole contract must so clearly appear as to entitle the purchaser to assert his ownership.

That an acceptance and receipt of a part of the goods sold to satisfy the statute must be by the buyer himself, or by some one duly authorized to accept in his behalf.

That where the buyer merely agrees to take all the goods of a particular kind and quality, which are not at the time selected or set apart, but form part of a large lot from which they are afterwards to be selected by the seller, and are set apart and marked by the seller, such acts do not constitute an acceptance on the part of the buyer.

That the receipt of a part of such goods by an expressman not authorized to accept will not bind the buyer.

That the acceptance by the buyer of the part delivered by an expressman will not constitute an acceptance on the part of the buyer of the whole unless such intention clearly appear.²

§ 282. It seems to be a reasonable and universal rule that the vendee has the right, in all cases, to inspect goods purchased after their delivery, to see whether they are in accordance with the order. But if the vendee sell the goods without inspecting them, that is held to be tantamount to an acceptance of them.³

On the other hand, the act of the vendee insuring the goods does not amount to an acceptance, if, within a rea-

¹ *Wade v. N. Y. & Oswego Mid-land Railroad*, 52 N. Y., 627. C. Q. B. (O. S.), 196; *Downer v. Thompson*, 2 Hill, 137.

² See *Remick v. Sandford*, 120 Mass., 309; *Marsh v. Hyde*, 3 Gray, 331, 333; *Grover v. Cameron*, 6 U. S. 314. ³ *Hill v. McDonald*, 17 Wis., 97; *Fletcher v. Ingram*, 46 Wis., 191; *Hoffman v. King*, 58 Wis., 314.

sonable time, he reject them as not being according to order.¹

Lord Tenterden, in an important case, decided that the defendant is bound to object to receive the goods within *a reasonable time*; and that it is a question for the jury whether he did so.²

§ 282*a*. The principle also runs through all the cases, that the buyer has a reasonable time within which to accept goods which have been delivered. He should be as prompt as, under all the circumstances of the case, he can be.³ Usage, in respect to the goods delivered, may well govern as to time.⁴

Where delay has not worked an acceptance, see note;⁵ where delay has been held tantamount to acceptance, see note.⁶

And it should be steadily borne in mind that the acceptance and receipt contemplated by the statute of frauds and as adjudged by the cases must always be governed by the circumstances surrounding the transaction, as to whether there has been such acceptance and receipt. And that in general these facts are to be passed upon by the jury.

¹ *Bacon v. Eccles*, 43 Wis., 227.

S., 445; *Currie v. Anderson*, 2 E.

² *Coleman v. Gibson*, 1 Moody & Rob., 168; *Gordon v. Simonton*, 10 Fla., 179, as to meaning of "reasonable time."

& E., 599.
⁴ *Coleman v. Gibson*, 1 M. & Rob., 169.

³ *Bowes v. Pontifex*, 3 F. & F., 743; *Curtis v. Pugh*, 10 A. & Ell. N. S., 113; *Treadwell v. Reynolds*, 39 Conn., 34; *Gaslin v. Pinney*, 24 Minn., 323; *Spencer v. Hale*, 30 Vt., 317; *Smith v. Hudson*, 6 B. &

⁵ *Rickard v. Moore*, 38 L. T. Rep. N. S., 841; *Nicholls v. Plume*, 1 C. & P., 272; *Cunliffe v. Harrison*, 6 Exch., 905.

⁶ *Baylis v. Lundy*, 4 L. T. N. S., 176 (K. B.); *O'Brien v. Barker*, 4 New Zeal. Jur. N. S., 64.

CHAPTER XIV.

CONCERNING ACCEPTANCE AND RECEIPT—OF RECEIPT AND DELIVERY.

- § 283. Rule under the common law and under the statute of frauds as to receipt.
- 284. Meaning of "receipt;" delivery for a special purpose; intention of the parties.
- 285. When receipt may indicate acceptance.
- 286. Delivery the correlative of receipt, although not used in the statute.
- 287. Actual receipt must be intended by the parties to be complete.
- 288. What will constitute actual receipt; *Gray v. Sullivan*.
- 289. Case of contemplated delivery.
- 290. A delivery without acceptance; the case of *Kerhof v. Atlas Paper Company*.
- 291. Where goods are delivered at a place designated by the vendee.
- 292. Example; *Caulkins v. Hellman*; an act as part of the *res gestæ*.
- 293. Another example; where there was a partial delivery; *Van Wroet v. Albany & Susquehanna Railroad*.
- 294. The same subject continued; an Arkansas case.
- 295. The same subject; a Colorado case.
- 296. Where part of the goods are delivered and the vendee waives the condition that the whole be delivered at one time, it is a complete delivery.
- 297. The same subject continued.
- 298. Usage may govern as to delivery.
- 299. Goods must be set apart for identification to constitute a delivery.
- 300. A person may make delivery to his bailee without taking the property into his own possession for the purpose.
- 301. A case of resale; *Blanchard v. Trim*.
- 302. As to the place of delivery; rule where no place is designated.
- 303. Where goods are delivered at place designated, partly paid for, and destroyed by fire, sale complete; *Mason v. H. Whitbeck Company*.
- 304. In an executory contract, where the price is paid, title passes.
- 305. Contract of purchase without change of possession, invalid; *Kirby v. Johnson*.

§ 306. Where there is neither actual nor symbolical delivery, contract void; *Bailey v. Ogden*.

307. Simple act of marking goods not sufficient to constitute receipt.

308. Flexibility of the statute of frauds.

§ 283. Previous to the statute of frauds, delivery, or its correlative, receipt, was not an important quality in the constitution of contracts for the sale of goods.

The only essentials to the validity of a sale at common law were, a proper subject, a price or consideration, and the mutual consent of the contracting parties; where these concurred the sale was deemed complete.

And where nothing remained to be done but that the buyer should pay the price and take the same thing, the property passed to the buyer, and with it the risk of loss by fire or any other accident. Appropriation was equivalent to delivery, and assent of the buyer to take the goods was equivalent to his acceptance of them.¹

To constitute an "actual receipt" as contemplated by the statute, the possession of the goods must be parted with, so as to deprive the vendor of every lien thereon. The delivery must be so intended by the vendor, and must be unrestrained and voluntary.

Delivery, in some cases, has been held to include as well the act of the seller in transferring the goods, as of the buyer in receiving them; and this interpretation seems to be reasonable.²

§ 284. A reasonable interpretation of the meaning of the word "receipt," as adjudged by the decisions, is the act of taking possession of the goods sold. When the seller

¹ *Dixon v. Yates*, 5 B. & Ad., 313.

² *Hilliard on Sales*, 135, and cases cited; *Chitty on Contr.*, 390, and cases cited; *Stone v. Browning*, 68 N. Y., 598; *Barkalow v. Pfeffer*, 38 Ind., 214; *Bailey v. Epperly*, 2 id., 85. *Gardner, J.*, in *Shindler v. Houston*, 1 N. Y., 261, declares the

language of the statute of frauds to be unequivocal, and that it demands the action of both parties, for the reason that acceptance implies delivery, and there can be no complete delivery without acceptance.

gives to the buyer absolute control of the goods, and the buyer accepts such control, he has actually received them. Such receipt is often evidence of an acceptance, but it is not the same thing. Indeed, the receipt by the buyer may be and often is for the express purpose of seeing whether he will accept or not. Such question, in general, is to be determined upon all the existing facts in the case.¹

The court, Andrews, J., in the court of appeals of New York, in *Cornell v. Clark*,² asserted the rule to be substantially as follows: If the delivery is for a *special purpose*, as where the property is put into the custody of the vendee to meet some term of the contract not inconsistent with the retention of title by the vendor, such a qualified delivery will not pass the title contrary to the intention. In that case the delivery was for the express purpose of inspection and selection.

§ 285. When the act of receiving goods clearly indicates that the purchaser has accepted them, a contract otherwise void becomes valid and obligatory under the statute of frauds.

This general principle has been adhered to since the important and early case of *Tempest v. Fitzgerald*,³ both in England and in this country. The same doctrine was approved and applied by the New York court of appeals, in the case of *Shindler v. Houston*.⁴ There, Gardner J., said

¹ *Brand v. Focht*, 3 Keyes (N. Y.), 409; 30 How. Pr., 313; *Samuels v. Gorham*, 5 Cal., 226; *Garbet v. Belknap*, 1 id., 399; *Quintard v. Bacon*, 99 Mass., 185; *Rodgers v. Phillips*, 40 N. Y., 519; *Blackburn on Sales*, 106.

² 5 N. Y. S. Rep., 772.

³ 3 Barn. & Ald., 680. See, also, *Carter v. Toussaint*, 5 id., 855; *Baldey v. Parker*, 2 Barn. & C., 37; *Lillywhite v. Devereaux*, 15 Mees. & Wels., 285; *Browne on Stat. of Fr.*, 318.

⁴ 1 N. Y. (1 Com.), 261; *Dewey v.*

Williams, 5 Allen (Mass. R.), 1; *Prescott v. Locke*, 51 N. H., 94, 100; *Gilman v. Hill*, 36 N. H., 311; *Shepherd v. Pressey*, 32 N. H., 49; *Hewes v. Jordan*, 39 Md., 408; S. C., 17 Am. Rep., 578; *Smith v. Bouck*, 33 Wis., 19; *Brabin v. Hyde*, 32 N. Y., 519; *Duplex Safety Boiler Company v. McGinness*, 64 How. Pr. R., 99; *Edan v. Dudfield*, 1 Q. B., 302; *Mason v. Whitbeck Co.*, 35 Wis., 164; *Amson v. Dreher*, 35 id., 615; *Cottrell v. Stevens*, 10 id., 422.

the delivery must be with the intention of vesting the right of possession in the vendee, and there must be an actual acceptance by the vendee with the intention of taking possession of the goods as owner.

All this must be independent of the proof of the contract.

In a well considered case it was held that where, under a verbal contract of sale of goods in value over \$50, a delivery is made to one of several joint purchasers and accepted by him, the contract is rendered binding as to all.¹

§ 286. In cases where the question has arisen as to the receipt necessary to validate a parol contract for the sale of goods, the judges have almost uniformly used the word *delivery* as the correlative of that receipt. This construction no doubt has occasioned some confusion in the mind of the student. For delivery has been used not only to indicate the passing of the property in the thing, but to denote the transfer of the actual title as well.

While the word delivery is not used in the statute of frauds, "acceptance and actual receipt" of part of the goods sold at least are required, which are acts of the buyer.

For different phases of the question which have arisen see note.²

In *Wilcox v. Jackson*,³ Beck, C. J., interpreting this provision of the statute of frauds, and in approving the case of *Cook v. Mann*,⁴ in effect said that the vendee must take the actual possession, and the possession must be open, notorious and unequivocal, such as to apprise the community, or those who are accustomed to deal with the party, that the

¹ *Smith v. Milliken*, 7 Lansing, Sup. Ct. (N. Y.), 336.

² *Boardman v. Spooner*, 13 Allen, 357; *Morse v. Sherman*, 106 Mass., 433; *Mathieson & Weichers Reflector Company v. McMahon*, 9 Vroom (N. J.), 536; *Upton v. Sturbridge Cotton Mills*, 111 Mass., 453; *Hausman v. Nye*, 62 Ind., 485;

Lloyd v. Wright, 25 Ga., 215; *Pulian v. Wright*, 20 id., 574; *Gibbs v. Benjamin*, 13 Am. L. Reg. (N. S.), 93; *Edwards v. Grand Trunk Railway Company*, 54 Me., 105; *Lawrence v. Chase*, 54 Me., 196.

³ 7 Cal., 526.

⁴ 6 Cal., 21; *McCraw v. Welch*, 2 Cal., 291.

goods have changed hands, and that the title has passed out of the seller into the buyer.

The possession must be exclusive of the vendor; a concurrent or joint possession is not admissible.

§ 287. In general the receipt of goods is established when the purchaser assumes control over them with the acquiescence of the seller.

In *Dehority v. Paxson*¹ this question was directly involved.

The language of the statute of frauds of Indiana reads: "unless the purchaser shall receive part of such property."

What the statute requires, said the court, is an act of the purchaser, that he shall *receive*. This involves delivery, but it is not intended that the seller, by his act of delivery, shall be able to render the contract enforceable against the purchaser without his receiving the goods, or some part thereof, as his property under the contract.

The seller must part with his control with the purpose of vesting the right of property in the buyer, who must receive the same with such intent on his part. Such receipt may be subsequent to the agreement.²

The receipt by the purchaser of a part of the goods, which would involve the delivery of a part, would satisfy the statute of frauds.

In *Scott v. Eastern Counties Railway Company*,³ it was clearly held that if an order be given for goods, some of which are ready-made at the time of the contract, and the rest are to be manufactured according to order, and the goods which are ready-made are afterwards delivered and paid for, the acceptance of them is a part acceptance of the whole, to satisfy the seventeenth section of the statute of frauds, as the whole forms but one entire contract.

§ 288. As to what will constitute delivery and actual

¹ 97 Ind., 256.

³ 12 M. & W., 33; 13 L. J. Ex.,

² *McCarthy v. Nash*, 14 Minn., 14; 7 Jur., 996.
127; *Gaslin v. Pinney*, 24 id., 322.

change of possession under the statute of frauds was also passed upon in the cases of *Estey v. Cooke*,¹ and *Twist v. Kelly*.²

The case of *Gray v. Sullivan*³ also presents the same general question. The property there involved consisted of animals, wagons and harness. It was contended on the part of the appellants that the evidence did not show such a change of possession as to satisfy the statute of frauds. Hawley, C. J., after stating the facts proved at the trial and declaring that they are not analogous to the evidence offered in *Hurlburt v. Bogardus*,⁴ nor similar to the case of *Doak v. Brubaker*,⁵ declares that there was actual possession by the vendee; that it was "open and unequivocal, substantial and continuous," and was not taken to be surrendered back, if the respondent's testimony was true. The judgment in favor of the plaintiff and the order appealed from were affirmed. Beatty, J., dissented from the judgment of the court. He held that two things must concur to give validity to a sale, namely, an actual change of possession, and that such change must be continued. "Now, if we know what, under any particular state of circumstances, is essential to be done in order to effect the actual change of possession required, we know equally well that the continuity of such actual change is at once destroyed if everything necessary to effect it is undone immediately afterwards."

The learned justice cites the case of *Doak v. Brubaker*, *supra*, as analogous, and holds that the statute aims to secure "probity and fair dealing."

The case is a good illustration of the necessity of the law and the wisdom of enforcing it. "Construed as it has been in this case," said the justice, "it is reduced, in my opinion,

¹ 12 Nev., 276.

² 11 Nev., 377.

³ 10 Nev., 416. See, also, *Clute v. Steele*, 6 id., 335, 215; *Conway v. Edwards*, 2 id., 190; *Carpenter v.*

Clark, 2 id., 243; *Lawrence v. Burnham*, 4 Nev., 361.

⁴ 10 Cal., 519.

⁵ 1 Nev., 218, 222.

to a state in which there will be none so poor to do it reverence; no capacity too mean and no artifice too shallow for evading it." He thought the judgment should be reversed.

The court in *Conway v. Edwards*, *supra*, says that nothing generally can have a more direct tendency to show a change of possession than the control and management of the property or acts of ownership exercised by the vendee over it.

§ 289. In *Lownsdale v. Hunsaker*¹ it appeared that the plaintiff was owner of a band of cattle and horses then kept and running in Klikitat county, Washington territory.

A contract in writing was entered into whereby the plaintiff agreed to sell to the defendant the said horses and cattle, delivered as "soon as practicable after the navigation of the Columbia river is open," etc. It was also agreed that, if any of the cattle or horses should be dead or missing at said time, the amount equivalent in value would be taken out of the aggregate purchase price.

The court, Boise, J., held, with the court below, that the contract was simply "a contract for a sale," and that the property "did not pass out of Lownsdale;" and further, that by the contract there was no delivery, but a contemplated delivery in the future.

Judgment in favor of the defendant was affirmed. Clearly, the essential elements of a subsisting and binding contract were wanting.

§ 290. The case of *Kerhof v. Atlas Paper Company*² is the most recent one on the subject of delivery but where there was no acceptance under the statute of frauds. The contract was a parol executory one, for the sale of wood for a price exceeding \$50. As found by the jury, the plaintiff cut, hauled and banked, at the place designated, on the Fox river, two hundred and thirty cords of dead wood of the quality specified in the contract; that after two hun-

¹2 Oreg., 101. See, also, *Dooley v. Eilbert*, 47 Mich., 615. ²32 Northwestern R., 766.

dred cords of the wood had been banked the defendant paid \$250 towards the wood, but did not then know the quality of the wood which had been banked. These facts were the result of the special findings of the jury. Nothing is said as to acceptance or non-acceptance of the wood by the defendant.

The court, Cole, C. J., said: "Under the circumstances it was essential for the plaintiff to prove, and for the jury to find, an acceptance to take the case out of the statute. Every special verdict should submit all material controverted facts."¹

Unless the contract was fully executed by delivery and acceptance, it was void under the Wisconsin statute of frauds.²

Only by acceptance can the written memorandum be dispensed with. The learned court further says: "Upon the special verdict, then, the plaintiff was clearly not entitled to have judgment for the value of the wood, since no acceptance was shown so as to complete the sale. It cannot well be said that the payment of the \$250 some weeks after the contract was made would have the effect to validate the agreement, or take the case out of the statute.

"The earnest money to bind the bargain must be paid '*at the time*' the contract is entered into."

The judgment of the circuit court, dismissing the complaint upon its merits, was affirmed.

§ 291. *Hanson v. Roter*³ presents the question of an oral contract for the sale and delivery of a quantity of logs. The plaintiff testified that, under the agreement made with the defendants, he "was to put the logs by the railway track which was by my place;" that Roter agreed to scale the logs gotten out every month, and pay for them, but he did not do so.

The plaintiff deposited a lot of logs at the place desig-

¹ *Pratt v. Peck*, 65 Wis., 463; 27 N. W. Rep., 180.

² R. S., § 2308.

³ 64 Wis., 622; *Pike v. Vaughn*, 39 Wis., 499; *Hardell v. McClure*, 2 Pin., 289 (1 Chand., 271).

nated, but the defendants refused to receive them, as not merchantable. The defendants contended that the contract was within the statute of frauds, and void. The court said: "The objection seems to us insuperable." The attempt to avoid the force of the objection by saying that, when the plaintiff delivered the logs at the place agreed upon, the title passed to the defendants, was not sustained by proof.

It was competent for the parties to so agree;¹ but the court held there was "no evidence of such a contract being made;" nor did the plaintiff swear that such was the contract; that it could not with propriety be said that the contract was for special skill and labor, as in *Meinke v. Falk*.²

The judgment in favor of the plaintiff was reversed, and the cause remanded with directions to dismiss the complaint.

§ 292. In *Caulkins v. Hellman*³ there was a verbal contract of sale of certain wine, which was delivered as directed at Blood's Station.

The court below instructed the jury that, if the wine was actually delivered in pursuance of the verbal contract, the contract might be enforced.

Such instruction would have been good law if the contract had been in writing instead of being verbal; but clearly, as the contract was void by the statute of frauds, and as in such case there must not only be an actual receipt of the goods by the vendee, but an acceptance of them, to render the vendee liable for the price, and as these elements were wanting, the delivery made at Blood's Station did not satisfy nor take the case out of the statute of frauds.

Quite identical questions as were involved in the above case were presented in *Norman v. Phillips*,⁴ but the verdict for the plaintiff in that case rested upon the additional fact

¹ *Morrow v. Reed*, 30 Wis., 81.

² 55 Wis., 427.

³ 47 N. Y., 449; *Wade v. New*

York & Oswego Midland Railroad Co., 52 N. Y., 627.

⁴ 14 Meeson & Wellsby, 277.

that an invoice was duly sent to the vendee and retained by him for several weeks.

Rapallo, J., in *Caulkins v. Hellman*, thought the trial judge erred in excluding evidence of the contents of a telegram which the defendant attempted to send to the plaintiffs immediately upon the receipt of the wine. That "if, as was offered to be shown, it stated that he declined to accept the wine, it was material as part of the *res gestæ*. A *bona fide* attempt, immediately on receipt and examination of the wine, to communicate such a message, was an act on his part explaining and qualifying his conduct in receiving the wine into his store and allowing it to remain there. And even though the message never reached the plaintiffs, it bore upon the question of acceptance by the defendant."

The *bona fide* attempt by the defendant to communicate his rejection of the goods was clearly material and competent to rebut the presumption of an acceptance arising from the retention of the goods.¹

The judgment in favor of the plaintiff was reversed.

§ 293. *Van Woert v. Albany & Susquehanna R. R. Co.*² was an action for damages for refusal to fulfill a contract for the purchase of one thousand cords of wood.

In May, 1869, a parol contract was made, whereby the defendant agreed to purchase and pay for such quantity of wood as the plaintiff could cut and deliver, at \$3.50 per cord for hard wood and \$3 per cord for soft wood. Within a year thereafter three hundred and twenty-two and one-half cords had been delivered and paid for. The defendant then refused to pay for any more, even for the nineteen cords which had been drawn and piled by the side of defendant's road.

On the trial below the court charged the jury that the contract testified to was void under the statute of frauds; but if they found that such a contract was made, and the

¹ But see *Kibble v. Gough*, 38 L. T. N. S., 204, and *Page v. Morgan*, 33 Weekly Rep., 793. ² 67 N. Y., 539.

wood subsequently delivered was accepted, such delivery and acceptance took the contract out of the statute and made it valid; and if the parties understood when the last portion of wood was delivered, or when it was paid for, that there was such a contract, and that it was to continue thereafter and be fulfilled by the delivery of the wood at a subsequent time, the plaintiff could recover damages for the refusal of the defendant to accept the wood offered by the plaintiff, to be delivered in the winter of 1870 and 1871. From this charge the defendant excepted and appealed.

Earl, J., says: "We will assume, as most favorable to the appellant, that that was not a contract for work and labor, but one for the sale of the wood, and as there was no compliance with the statute of frauds, that it was void when made.

"There was subsequently a delivery of wood, and the judge submitted the evidence to the jury for them to find whether such delivery was upon and in pursuance of the prior contract, and as there was sufficient evidence authorizing such a finding, we must assume that they found that the subsequent delivery was upon the contract. Hence such delivery answered the requirements of the statute of frauds and made the contract of sale valid.¹

"This is not the case of a contract not to be performed within a year. It was not such that by its terms it could not be performed within a year, but it might have been, and therefore was not void.²

"This was a contract binding upon both parties after the partial delivery. The plaintiff was bound to cut and deliver as much as he could up to one thousand cords, and was bound to use reasonable efforts to perform his part of the contract; and the defendant was bound to take and

¹ McKnight v. Dunlap, 5 N. Y., 537; Thompson v. Mink, 2 Keyes, 86; Bordwell v. O'Keefe, 32 Barb., 434; Townsend v. Hargraves, 118 Mass., 336.

² Lockwood v. Barnes, 3 Hill, 128; Baptist Church v. Ins. Co., 19 N. Y., 307.

pay for the wood thus delivered. Hence there was mutuality in the contract.

“The contract, as proved, was not so indefinite as to be void. There was no particular time mentioned within which the wood was all to be delivered. But the law in such a case gives the vendor a reasonable time, and that is sufficiently definite as to time. The quantity was limited to one thousand cords, and the vendor was obliged to deliver all or so much of this as he could, and that was sufficiently definite and certain as to quantity.” The judgment of the general term was affirmed.

§ 294. *Swegart v. McGee*,¹ an Arkansas case, was also where a part of the goods had been delivered.

There the plaintiff bargained to sell to the defendant three hundred bushels of corn at \$1 per bushel, to be paid for on delivery, at the cribs of the defendant; one hundred bushels to be delivered in March, and two hundred bushels within one month thereafter; one hundred bushels were delivered at the time of the sale, and paid for at the price agreed. Afterwards the plaintiff demanded the two hundred bushels, but the defendant refused to deliver them. Damages were claimed for their non-delivery. Judgment was for the defendant. On appeal, English, C. J., said: “The contract for the sale and delivery of the three hundred bushels of corn was manifestly an *entire* and not a separate contract.² The delivery of part of the corn, and payment thereof, took the contract out of the statute of frauds. The plaintiff was entitled to recover damages for the non-delivery of the residue of the corn.” Judgment was reversed.

The statute of frauds of that state provides that no contract for the sale of goods, etc., shall be binding, unless the purchaser shall accept a part of the goods sold and actually receive the same. As this was an entire contract and one-

¹ 19 Ark., 473.

² *Harteau v. Gardner*, 51 N. Y., 678.

third of the corn was delivered, the contract came within the operation of the statute and bound the defendant.

While the contract is entire a partial delivery will validate the contract as to the whole.¹

§ 295. The case of Sloan Saw Mill and Lumber Company v. Guttshall² presents the question as to part performance of a contract, and as to what constitutes a sale and delivery.

There the defendant bargained for four hundred thousand feet of lumber, to be sawed by the plaintiff and sold to the defendant, as the same should average, without separating the clear from the common lumber, at \$14 per thousand; the lumber to be delivered as fast as sawed at the saw-mill of plaintiff, in El Paso county; to be paid for by the thousand feet as fast as delivered, the plaintiff promising to accept the same.

Two hundred and seventy-four thousand feet of said lumber were delivered and accepted on July 28, 1873, but the defendant refused to pay for the same.

On July 28, and August 4, the balance of said lumber was tendered, but the defendant refused to accept it. The plaintiff resold the balance of said lumber August 8; the deficiency on said sale was \$256, which the defendant refused to pay.

A verdict was rendered for the plaintiff; the defendant appealed.

After passing upon the several errors assigned, the court, A. W. Stone, J., said that the evidence showed a contract, and a part performance of it, by the delivery by the vendor and the acceptance and payment of part of the lumber by the vendee. "That the acceptance and receipt of some part of the thing sold will take the case out of the statute is now well settled, if any doubt ever existed upon the subject, and that the acceptance and receipt may take place subsequent to the making of the verbal agreement."

The requisites of the statute are fulfilled.

¹ 2 Parsons on Cont., § 4, p. 29, ² 3 Col., 8.
and note.

§ 296. In *Paige v. Ott*¹ the contract was for the delivery of a quantity of timber upon a given day at a stated price to be paid upon delivery. A part only was delivered, and the parties agreed that the contract should be considered as performed upon the delivery of another quantity at a still future day. A portion of this was delivered and used by the vendee; it was held that there could be no recovery for the lumber delivered under either contract.

The effect of the parol agreement extending the time was discussed in the opinion of the court, and it was decided that it was only a modification of the first agreement.

§ 297. But in *Avery v. Wilson*² it was held that while, as a general rule, no action will lie on the part of the vendor upon a contract for the sale and delivery of a specified quantity of goods, until the whole quantity is delivered, yet where the whole delivery is to be at one and the same time, and the vendee elects to receive a portion and appropriates the same to his own use, and by his acts evinces that he waives the condition precedent of a complete delivery, the vendor may recover for the portion delivered.

§ 298. In *Newhall v. Langdon*,³ A. had stored in a railroad depot one hundred barrels of flour, by itself, the carrier's charges paid, and the flour placed in charge of the agent of the railroad company, as a warehouseman. A.

¹ 5 Denio R., 406.

² 81 N. Y., 346; *Mead v. De Golyer*, 16 Wend., 636; *Smith v. Brady*, 17 N. Y., 187; *Vanderbilt v. Eagle Iron Works*, 25 Wend., 665; *Krom v. Levy*, 3 T. & C., 704; 6 id., 253; *Flanagan v. Demorest*, 3 Robt., 173; *Nomington v. Cook*, 2 T. & C., 423; *Welch v. Moffat*, 1 id., 575. But see *Cotlin v. Tobias*, 26 N. Y., 217.

³ 39 Ohio St. R. See *Wood v. McGee*, 7 Ohio, 467, distinguished; *Steel Works v. Dewey*, 37 Ohio St.,

242; *Young v. Miles*, 23 Wis., 643; *Cloud v. Monman*, 18 Ind., 40; *Horr v. Barkie*, 8 Cal., 489; *Cushing v. Breed*, 14 Allen, 376; *Kemberly v. Patchin*, 19 N. Y., 330; *Waldron v. Chase*, 37 Me., 414; *Chapman v. Shepard*, 39 Conn., 413; *Whitehouse v. Frost*, 12 East, 614; also notes to *Hurff v. Hires*, 17 and 18 Am. Law Reg., 17, 161, in which the whole subject is exhaustively discussed and the cases reviewed. See also, 28 Alb. L. Jour., 335.

sold to B. fifty barrels, and subsequently sold to C. and D. twenty-five barrels each, and gave to each purchaser, in the order of sales, an order on the company's agent for the number of barrels purchased. B. sent his team and driver, with his order, to bring away part of the purchase. The order was presented to the agent, who received it, and pointed out the lot of flour, from which the driver took seventeen barrels, leaving the order and his receipt for the flour removed.

After that, on the same day, C. and D. each presented his order, receipted for, and took away the flour they had purchased, leaving the thirty-three barrels due on B.'s order in store, which were, the ensuing night, destroyed by fire.

It was the usage that flour so received by rail and stored remained in the custody of the railroad company until sold, and when sold the owner gave to each purchaser an order on the company for the flour purchased, and upon presentation of such order the agent would point out the lot from which the order was to be filled, and the purchaser would remove and receipt for the amount taken; that nothing remained to be done by the seller in contemplation of the parties to complete the sale. It was held that by such usage the flour called for by the order, after its acceptance by the railroad company, was the property of the purchaser, and he was liable to the seller for the price, though part of it was destroyed before being removed to his actual possession.

§ 299. In order to constitute a delivery of goods, except, perhaps, such as wine, oil, or grain of a common quality, they must be set apart so that they may be taken without any further act of the seller.

Thus it was held in a recent case involving the sale of lumber of a particular quality, that it was the duty of the vendor to separate the same so that the lumber could be identified, and until this was done there could not be a sufficient offer to deliver as to put the vendee in default for

not accepting and carrying the same away.¹ In all such cases the goods must be capable of identification.

So where there is a sale of goods, by number, weight or measure, at so much a piece, a pound or bushel, it is necessary that the things should be counted, weighed or measured before the price or consideration to be paid can be ascertained. Before this is done, the sale is not so consummate and perfect as absolutely to change the property, but the goods still remain at the risk of the vendor.

§ 300. In *Snider v. Thrall*² it appeared that the defendant sold a house to the plaintiff for \$140, to be paid for in cash, and work and materials. At the time the plaintiff was in possession of the house. It was contended by the plaintiff that the sale was void under the statute of frauds, as the contract was not in writing.

There had been a chattel mortgage foreclosed on the house while the plaintiff occupied it. The court said: "We cannot see that it should change the result. The law surely did not require, under the circumstances, that the plaintiff should go through the idle ceremony of removing from the house, delivering up possession to the defendant, and then going back into possession under the sale in order to make the contract valid."

A person can sell his property to his bailee and make a good delivery of it without actually taking the property into his own possession and then returning it to the possession of the vendee. The question was, Did the plaintiff really purchase the house on the mortgage sale and go into

¹ *Hoffman v. King*, 58 Wis. R., 308. This, also, is the doctrine, as laid down by Lord Ellenborough, in *Hanson v. Meyer*, 6 East, 625; and see *Bailey v. Ogden*, 3 Johnson's R., 399-421. If no payment or tender of the price is made, the vendor is at liberty to dispose of the goods as he pleases. *Roberts on Stat. of Frauds*, 165, 166.

² 56 Wis., 674.

¹ *Hoffman v. King*, 58 Wis. R., 314; 17 Northwestern R., 136; 2 Kent, Com., 496; *Veazy v. Harmony*, 7 Greenl., 91; *Isherwood v. Whitmore*, 11 Mees. & W., 345; *Avery v. Stewart*, 2 Conn., 69; *Thrall v. Lathrop*, 30 Vt., 307; *Coles v. Clark*, 3 Cush., 399; *Morgan v. Kidder*, 55 Vt., 367. See *Pothier, Traite du Contract de Vente*, part 4,

the possession of it as the owner under such sale? If he did, as found by the court, then the contract was not within the statute of frauds.

The judgment of the court below was affirmed.

§ 301. The case of *Blanchard v. Trim*¹ decides the question as to what will not amount to a rescission of a sale. There the plaintiff sold to one Calkins certain lumber, a portion of which had been delivered. Finding himself unable to pay for the lumber he requested the plaintiff to buy it back of him. After inspection of the lumber, in presence of both parties, it was agreed that it should be taken back by the plaintiff, and that he would draw the lumber away as soon as the weather would permit. Before it was removed the sheriff levied upon the lumber, by direction of the defendants, under an execution in a judgment against Calkins. It was claimed that the lumber had not passed to Blanchard before the levy, for the reason that there was no actual delivery of the possession, and that the statute of frauds intervened and that the sale was void.

The plaintiff, appellant, contended that the transaction was a rescission simply of an existing sale, and that under the circumstances the title had passed to the original vendor.

But the court held that as a simple sale by Calkins to Blanchard it could not be sustained under the statute. The delivery was not sufficient. As Calkins had had the lumber for three months and used some of it, the court declared the contract to be a resale, and not a modification of an existing contract, and affirmed the judgment.

§ 302. It may be stated as the general rule, that, where no place is designated by the contract for the delivery of goods sold, they are to be delivered where they are deposited or kept at the time of the sale; that is, at the place of their manufacture; the store of the merchant; the farm of the farmer, and so on. This rule obtains where there are

¹ 38 N. Y., 225. But see *Cummings v. Arnold*, 3 Met., 486.

no controlling circumstances to show that a different place was intended.

Illustration: A. does business in Boston; B. in Portland; A., in his place of business, agrees to sell and deliver to B. a quantity of glass; A. does not then have the glass in store or on hand, but has to purchase it in Sandwich to enable him to fill the order. The evidence on the trial being conflicting as to the place of delivery, in such a case the *onus* is upon the defendant B. to prove, by a preponderance of evidence, that the glass was to have been delivered to him at Portland; not simply on the cars at Boston.

The presumption of law, that the place of delivery is the place where the goods are at the time of the sale, is not removed from the fact that the plaintiff has not the goods on hand in store at the time, for potentially and prospectively the goods are as if then actually in the store of the vendor.¹

§ 303. In *Mason v. The H. Whitbeck Company*,² it is held that although a contract may be void by the statute of frauds, yet it is rendered binding from the time of delivery.

This was an action to recover an unpaid balance of the contract price for a quantity of lath sold by the plaintiff to the defendant. The defendant verbally agreed to purchase all the lath which the plaintiff should manufacture during the fall of 1871, at the mill of one McCartney, in Marinette. The lath was to be piled on the dock of McCartney near the said mill, the defendant agreeing to pay the plaintiff “\$1.48 per thousand for the said lath, delivered on the said dock of William McCartney, aforesaid.”

The plaintiff put about four hundred and fifty thousand lath on the said dock as agreed, and notified the agent of the defendant of the fact. The said agent then paid or ad-

¹ Benjamin on Sales, 1018, 1022; *Janney v. Sleeper*, 30 Minn., 473; *Middlesex Co. v. Osgood*, 4 Gray, 28 Alb. Law Jour., 319; *Roberts v. 447*; *Hamilton v. Calhoun*, 2 Watts, *Mazeppa Mill Company*, 30 Minn., 139; *Wilmouth v. Patten*, 2 Bibb, 413; *Codran v. Toher*, 14 id., 293. 280; *Sousely v. Burns*, 10 Bush, 87; ² 35 Wis., 165.

vanced to the plaintiff \$400 on account of the same. Before anything further was done in the matter the lath were destroyed by fire.

The answer alleged that the agreement was that the lath should not be considered as delivered until they should be counted and the number and quality thereof ascertained, and that payment therefor was to be made upon the arrival of a certain vessel upon which the lath were to be shipped.

The testimony on these points was conflicting.

The motion of the defendant for a nonsuit at the trial, on the ground that the contract was within the statute of frauds and void, was denied.

Lyon, J., deemed it obvious that the case was not affected by the statute of frauds.

On the trial the principal question litigated seems to have been whether the lath had been so delivered as to pass the title in them to the defendant.

The court say: "This question involved two propositions of fact asserted by the plaintiff and denied by the defendant, namely: That the terms of the contract were such that the piling of the lath upon the dock at the designated place, and giving the defendant due notice thereof before the lath were burned, was a full delivery, and passed the title to the lath to the defendant; and second, that although the contract may have been as claimed by the defendant, still, when such notice was given, the defendant accepted the lath without count or inspection, and thus became the absolute owner thereof."

The court thought the testimony tended to prove the truth of both these propositions, "and it is obvious that if either of them be true the plaintiff is entitled to recover. The jury must have found that at least one of them was proved, and, there being sufficient testimony to support the verdict, the court cannot disturb it unless there was some material error committed in giving the instructions to the jury which were given, or in refusing those which were asked on behalf of the defendant and refused."

The court then reviewed the several instructions given at the trial, and held that they stated the law correctly, but as the instructions asked for were modified by the court, the question was discussed whether the judgment should be reversed. Upon reaching the conclusion that the validity of the judgment was not affected by the modifications, as they were "merely formal or technical errors" which could work no injury to the party complaining of them, the judgment in favor of the plaintiff was affirmed.¹

§ 304. In *Powers v. Barber* ² it appeared that the plaintiff ordered a wagon of a builder, selected some portions of the materials and marked them, and paid a part of the consideration; and afterwards, on being notified that the wagon would be completed on a certain day, he sent the rest of the purchase price to the builder by mail, with directions that he deliver the wagon to a certain person who would call for it; the builder received the money so sent, but while yet the wagon was in his hands it was levied upon by the defendant under an execution against the builder. In an action by the buyer who had thus paid the price of the wagon, it was held on appeal that the plaintiff was entitled to recover, the title having passed to him by reason of the payments to the builder. The payment was tantamount to a delivery.

§ 305. In *Kirby v. Johnson*,³ Ryland, J., after quoting from Chancellor Kent, says he concurs in ascribing to the statute of frauds all that has been said in its praise. The above action arose out of an alleged sale of "four yoke of oxen" at the price of \$40 per yoke.

Nothing was paid down, and the defendant told the plaintiff he could pay when he came for the cattle, which would suit as well. Plaintiff requested defendant to keep the oxen until he sent for them, which the defendant agreed to do.

¹ See, also, *Amson v. Dreher*, 35 Wis., 615; but see *Cooke v. Millard*, 65 N. Y., 352, in which case, how-
ever, nothing was paid on the contract.

² 7 Alb. Law Jour., 170.

³ 22 Mo., 354.

"The oxen were not removed from the pasture; the contract was not reduced to writing, nor any money paid."

After the plaintiff started to leave, the defendant said to him, "Remember, if any of the cattle die, they die yours, and you must bear the loss." To which the plaintiff replied, "Certainly."

The defendant sold the cattle the next day to another purchaser for \$50 per yoke.

The action was to recover \$40, the difference in the price.

Before the court below the plaintiff had judgment.

The defendant appealed to the circuit court, where, on trial, the defendant had judgment.

In an elaborate opinion the court reviews the English and American authorities, and decides that it "cannot be pretended that Johnson had parted with his lien upon the cattle for the purchase money. There was no act done after the sale amounting to a delivery of the oxen by Johnson to Kirby, and an acceptance by Kirby of the oxen from Johnson. There was no delivery with an intention of vesting the right of possession in the vendee.

Ryland, J., further says: "If the courts of the country should decide that such facts as appear in evidence in this case are sufficient to take it out of the statute of frauds, then it is difficult to find what will come within that statute. Nay, we had better blot the statute from our books at once, and not fritter away its vitality by constructive deliveries and acceptance." The opinion of the learned justice is sound, both in logic and in law. The decision rests upon the well settled doctrine that words alone, in no case, can constitute such a delivery as is contemplated by the statute of frauds.

§ 306. In *Bailey v. Ogden*¹ (1808), the question of delivery was passed upon by Kent, C. J.

The clause of the statute of frauds of New York state, as to acceptance and receipt, was then the same as the English statute. There, certain boxes of sugar had been bargained

¹ 3 Johns. R., 399.

for by an agent of the defendants, and the plaintiffs had agreed to sell them at stated prices, upon indorsed notes; the giving of such notes to be agreed upon when one of the defendants, who was then absent, should return. Everything else in respect to the contract was completed.¹

The day after the agreement, and before the indorsed notes had been delivered, a fire occurred and destroyed the goods. The plaintiffs applied for the indorsed notes, but the defendants refused to give them.

In an action of *assumpsit* for the price, the case turned upon the pivotal question whether there had been a delivery. There had been no specific designation of the goods, by marking them or otherwise, nor any delivery, symbolical or actual. But the sugars were left in the possession of the plaintiffs, and under the same apparent dominion as before the negotiation.

If the conversation about storage, and taking a minute of the import entries, would in such case amount to an actual delivery, said the court, and be deemed a substitute for the note or memorandum in writing, "it appears to me that the statute of frauds would, in a great degree, become useless, and might be set aside as a dead letter."

"We do not wish to shake any of the cases in which the actual delivery required by the statute has been dispensed with, but those cases have gone far enough; our leaning should be towards the plain meaning of the statute." The motion of plaintiff for a new trial was denied.

The cases generally hold that the circumstances which are to be tantamount to delivery should be strong and unequivocal, so as to remove all doubt as to the intent and understanding of the parties.¹

§ 307. The simple act of marking the goods with the name of the buyer by his consent, ordinarily, is not such an acceptance as to bind him, unless there has been a delivery and actual receipt by the buyer.²

¹ See Roberts on Frauds, 174 to 183; 2 Esp. Cases, 598; Chaplin v. Rogers, 1 East, 192; Hunn v. Bowne, 2 Caines, 44; and Lansing v. Turner, 2 Johnson R., 16.
² Dyer v. Libby, 61 Me., 45; Rap-

So, also, it is well settled that where a delivery of goods is made for the special purpose, namely, to meet some term in the contract not inconsistent with the retention of the title by the seller, such qualified delivery does not pass the title contrary to the real intention of the parties at the time.¹

Under a parol contract, although a bill of the goods purchased has been received by the purchaser, containing the terms of the sale, it is not taken out of the statute of frauds before actual receipt and acceptance of the goods.²

§ 308. In *Pindall v. Trevor*³ the court says: "The statute of frauds is not an utterly inflexible one. Like all others of its class, it has its exceptions and modifications, and equity, especially, will always apply the exceptions and modifications when truth and justice demand it, and where the facts by the evidence warrant it."

In the early case of *Keatts v. Rector*,⁴ it was held that if possession be delivered and obtained solely under the contract and in reference exclusively to it, then the possession will take the case out of the statute of frauds.⁵

In *Vincent v. Germond*, *supra*, where the defendant purchased some cattle in the plaintiff's field, and nothing was paid, but the cattle were to be at the vendee's risk; and afterward the defendant, without saying anything to the plaintiff, took them away, it was *held* to be a good delivery. The conduct of the defendant in taking away the cattle without any new contract was sufficient ground to infer delivery.

The statute is not to be construed so as to be the means of fraud. And where it has been used as a cover to a fraud, equity will relieve against its provisions.⁶

pleye v. Adee, 65 Barb., 589; *Bill v.* 41 Ark., 418.

Bament, 9 M. & W., 36; *Proctor v.*
Jones, 2 C. & P., 532.

¹ *Cornell v. Clark*, 6 Cent. L. R.,
508; 10 Northwestern R., 888.

² *Pike v. Wieting*, 49 Barb., 314.

³ 80 Ark. R., 262 (1875), *Moore*,
Sp. J.

⁵ *Cain v. Leslie*, 15 Ark., 312;
Rhea v. Puyear, 26 Ark., 344; *Vin-*
cent v. Germond, 11 Johns., 283.

⁶ *Ryan v. Dorr*, 34 N. Y., 307;
Browne on Stat. of Frauds, § 438;
Tague v. Fowler, 5 Ind. R., 569.

CHAPTER XV.

CONCERNING SALES OF GOODS BY SAMPLE.

- § 309. Samples treated as specimens, or part of the bulk; general rules.
310. The statute of frauds may be satisfied, and still the purchaser may reject the goods sold by sample.
311. Where the sample is retained as part delivery; Lord Ellenborough's views.
312. Where a contract is void under the statute of frauds, mere delivery will not pass the title; otherwise as to a written contract; the case of *Taylor v. Mueller*.
313. The purchaser of goods by sample may reject them if not equal to sample.
314. Where the defendant bought certain wheat by sample, and exercised certain acts of ownership over it, and the wheat was equal to sample, the plaintiff recovered judgment; the case of *Dows v. Montgomery*.
315. Right of option of the purchaser.
316. When acceptance may take place; sale of unascertained property.
317. A sub-sale, evidence of acceptance; as to parol evidence of the contract; instance of resale of goods bought by sample, before examination; *Morton v. Tibbett*.
318. Acceptance of part as part performance of the contract; *Simpson v. Krumdick*; *Morton v. Tibbett* criticised.
319. Although goods be accepted, the purchaser may still reject them; evidence of acceptance, what sufficient; *Kibble v. Gough*; goods equal to sample.
320. What is an admission that there was a contract; a sale of wheat by sample; the bulk equal to sample; act of examination admits a contract; *Page v. Morgan*.
321. The same subject; acceptance follows a recognition of the existence of the contract of sale.
322. The case of *Page v. Morgan* discussed.
323. What amounts to an acceptance; Justice Blackburn's rule.
324. Where there is no contract in writing, there must be some overt act of acceptance; *Rickard v. Moore*, reviewing *Kibble v. Gough*.
325. How far custom governs; carrier cannot accept goods without special authority.

§ 309. Where goods are sold by sample, the sample may be taken simply as a specimen of the kind and quality of the goods, not forming any part of the goods sold; or the sample may be mutually considered by the parties as forming a part of the bulk. Where the latter is the case, the acceptance of the sample will satisfy the statute of frauds as to the fact of sale.

In all such cases it is requisite that goods shall be pronounced satisfactory by the purchaser, or that he shall have dealt with the goods, or done some act in regard to them evidencing his intention to accept and receive them unconditionally.¹

§ 310. The case of *Remick v. Sandford*² arose out of a sale by sample. It was there laid down that it is not enough for the vendor to show the mere fact that the goods correspond with the sample. He must go further and show that there was an acceptance and actual receipt by the vendee, to the extent of exercising dominion over the goods sold. It seems quite immaterial whether the buyer's refusal to accept and take the goods in fulfillment of the contract be reasonable or unreasonable; the real question to be determined in all such cases is whether he has accepted the goods.

In the above case, Devens, J., said: "There may undoubtedly be an acceptance which will not afford conclusive evidence that the contract has been fulfilled and its terms complied with, and which will yet satisfy the statute, and let in evidence of those terms which otherwise could only be proved by writing. If the buyer accepts the goods as those which he purchased, he may afterwards reject them, if they were not what they were warranted to be; but the statute is satisfied. But, while such an acceptance satisfies the statute,

¹ *Pinkham v. Mattox*, 53 N. H., 587; *Hausman v. Nye*, 62 Ind., 604; *Strong v. Dodds*, 47 Vt., 358; 491; *Bush v. Holmes*, 53 Me., 417. *Davis v. Eastman*, 1 Allen, 422; ² 120 Mass., 309, 316. See, also, *Stone v. Browning*, 68 N. Y., 600; *Borrowdale v. Bosworth*, 99 id., 51 id., 211; *Hewes v. Jordan*, 39 Md., 472; *Brewster v. Taylor*, 63 N.

in order to have that effect it must be by some unequivocal act done on the part of the buyer, with intent to take possession of the goods as owner. The sale must be perfected, and this is to be shown, not by proof of a change of possession only, but of such change with such intent.

“When it is thus definitely established that the relation of vendor and vendee exists, written evidence of the contract is dispensed with, although the buyer, when the sale is with warranty, may still retain his right to reject the goods if they do not correspond with the warranty. That there has been an acceptance of this character, or that the buyer has conducted himself with regard to the goods as owner, is to be proved by the party setting up the contract. It cannot be inferred as matter of law, merely from the circumstance that the goods have come into the possession of the buyer.”

The above decision is given quite *in extenso*, as it is a clear expression of the law arising in all such cases, and seems to be in accordance with the English and American decisions.

§ 311. The same general rule has been followed in the English cases. Thus, in *Hinde v. Whitehouse*,¹ Lord Ellenborough, Ch. J., observed that although it be delivered partly *alio intuitu*, namely, as a sample of quality, it does

¹ 7 East, 558. See, also, *Garfield v. Paris*, 96 U. S., 565; *Brandt v. Focht*, 1 Abb. Ct. App. Dec., 185; *Atwood v. Lucas*, 53 Me., 508; *Danforth v. Walker*, 40 Vt., 257; *Brock v. Knower*, 37 Hun, 609. In *Gardner v. Grout* (2 C. B. N. S., 340) it was held that where the goods are sold by sample the handing over the samples to the buyer does not, in the absence of evidence of a usage or a custom to the contrary, amount to a delivery and acceptance of a part of the thing sold, so as to take the case out of the stat-

ute of frauds; but it is otherwise where the buyer draws samples from the bulk after he has purchased the goods. If a sample is taken as part of the bulk sold it is a delivery within the statute, even if done by the agent of the purchaser. *Klinitz v. Surry*, 5 Esp., 267. So the delivery was held to be complete (in *Green v. Haythorne*, 1 Stark., 447) where wool was sold for a bill of nine months, and weighed and sample taken, and several bags delivered, but no bill was drawn.

not therefore prevent its operating to another consistent intent, also in pursuance of the purpose of the parties, as expressed in the conditions of sale, namely, as a part delivery of the thing itself, as soon as in virtue of the bargain the buyer should be entitled to retain, and should retain it accordingly.

§ 312. In the quite recent case of *Taylor v. Mueller*,¹ it appeared that the defendants verbally contracted by sample to purchase a lot of grain, which was then in an elevator, the same to be delivered at a specified place and at a stated price.

The plaintiff gave to the defendants an order on the keeper of the elevator, which order was handed to him, and afterwards the grain was sent by a carrier to the place agreed upon for its delivery. The defendants refused to receive it on the ground, as alleged, that the grain was inferior in quality to the sample.

The court held that there was no delivery; and also, that if the contract was otherwise void under the statute of frauds, it could not be enforced against the defendants. It is settled that a delivery in pursuance of a written contract will pass the title, but otherwise where the contract is void by the statute. In all such cases the shipment or transportation is at the risk of the vendor; for the act of the vendor alone is not sufficient to satisfy the statute of frauds.

In this case there was neither delivery nor acceptance while the grain was in the elevator in the name of the plaintiff. Nor did the circumstance that a delivery order was issued constitute an actual receipt of the grain on the part of the defendant. It was simply a written authority or right to receive and take the grain into possession.

It was held that a constructive receipt by the carrier at the elevator, upon the plaintiff's order, though at the defendant's request to send it to the place for delivery, fol-

¹30 Minn. R., 343, decided March, St. Louis Railroad Company, 33 1883, Vanderburgh, J.; Yallop-De Minn., 482, 501.
Groot Company v. Minneapolis &

lowed as it was by a reasonable inspection and rejection, because not equal to sample, did not amount to an acceptance. That the distinction between a mere delivery or receipt and acceptance is not to be lost sight of; and where the goods are sold by sample, that fact must be considered as an element in the case in determining whether the buyer has taken actual or constructive possession as owner, so as to indicate an acceptance thereby; and the burden of proof in all such cases rests with the vendor to show the intent on the part of the buyer to take possession as owner.¹

§ 313. In *Smith v. Stroller*,² as it appears, there was a sale of certain teas by sample. The price of the same amounted to more than "\$50." By the statute of frauds of Wisconsin, a contract for the sale of goods, etc., unless the requirements of the statute are fulfilled, is declared to be "void."

In this case, in the court below, it was charged that unless the teas sold to the defendant were as good as the sample shown him by the plaintiffs, the defendant had the right to refuse to receive the teas.

The question of acceptance was involved.

The court also charged that there must have been a delivery of the teas with the intention on the part of the plaintiffs of vesting the possession of the same in the defendant; and there must have been an actual acceptance by the defendant with the intention of keeping the teas if equal to the sample.

It was proved that the teas did not correspond with the sample. Accordingly, the court held that the charges in the court below were proper, and the judgment in favor of the defendant was affirmed.

§ 314. In *Dows v. Montgomery*³ the sole question was as to whether there was an acceptance and receipt of the goods

¹*Tanner v. Scovill*, 14 Mees. & W., 28; *Caulkins v. Hellman*, 47 N. Y., 452; *Knight v. Mann*, 120 Mass., 220; *Allard v. Greasert*, 61 N. Y., 5; *Johnson v. Campbell*, 105 Mass., 449; 28 Alb. Law Jour., 57.
²26 Wis., 671.
³5 Robt. Super. Ct. R. 445,

alleged, to have been sold by sample. It was a verbal contract for the purchase of two boat loads of wheat on board the boats *Wiltsie* and *Maria*, lying in the port of New York, on June 5, 1861. The wheat was to be put in store for account of the defendant for ten days, at one and one-fourth cents per bushel for that time, to be paid by the defendant. He was also to pay the plaintiffs \$1 a bushel within ten days after the said sale. The cargoes were, at the defendant's request, sent to the warehouse of one Barber, on account of the defendant.

The answer of the defendant was, in effect, a general denial. Afterwards, the defendant put in a supplemental answer, averring a rescission of the contract of sale and delivery by the plaintiffs, in that the plaintiffs had sold and delivered the wheat to other parties. The plaintiffs replied, denying the rescission, but admitting the resale, and alleging that the defendant was indebted to them in the sum of \$2,117.16, the difference between the contract price with the defendants and the amount realized on the resale.

The referee, to whom the issues were referred, found for the plaintiffs. The warehouseman was requested by the plaintiff to *screen and blow* the wheat, and *see that it corresponded to the sample* when he *took it into his store*.

It was proved by Barber that the bulk did correspond with the samples.

The referee found: "The defendant bought such wheat for shipment and exportation; and the plaintiffs had reason to suppose, and did suppose, that he intended to export the same. It was not in good condition for shipping; but wheat in the same condition was being shipped and exported from New York at that time."

The defendant repudiated the contract on the ground that the wheat was not fit to export, and not such as the plaintiffs agreed to deliver. It was contended by the plaintiffs that the delay in defendant's repudiation (from June 5, when the wheat was put in the warehouse, to the 14th, when

the defendant refused to take it) was sufficient evidence of acceptance to satisfy the statute of frauds.¹

After reviewing the testimony taken before the referee, which showed that the sale was by sample; that "by arrangement of the parties and *at the request of the defendant, delivered to and stored with Mr. Barber, for the defendant and on his account;*" and that "Barber, *as the agent of and at the request of*" the defendant, received such wheat and "compared it with the samples," with which the bulk corresponded,—the court, Robertson, Ch. J., said that "the findings of the referee as to the delivery of the wheat must be considered as final;"² and, therefore, the contract was not governed by the statute of frauds.

"The only two facts militating against this conclusion," says the court, "were the entry of the wheat in the warehouse keeper's books as received from the plaintiffs, and his receipt to the same effect, and the resale of the wheat by the plaintiffs. The first is fully explained by the custom of the business, the indorsement of such receipt to the defendant and his retaining the same. The second may have been some evidence of the sale never having taken place, but the referee disposed of its effect as such with the other evidence, and it could not have disproved both the sale and its rescission." The judgment was affirmed.

At the time of the resale notice was given to the defendant, and was declared by the plaintiffs not to be a rescission, but to be a sale on account of the defendant.

Monell, J., concurred, and said that the evidence of delivery and acceptance of the wheat was sufficient to bring the case within the exception contained in the statute.

§ 315. In *Gilman v. Hill*,³ Eastman, J., observes that there is no acceptance unless the purchaser has exercised

¹ *Hollingsworth v. Napier*, 3 Caines, 182; *Wilkes v. Ferris*, 5 Johns., 335; *Gray v. Davis*, 6 Seld., 285; *Outwater v. Dodge*, 6 Wend., 379; *Spencer v. Hale*, 30 Vt., 314. ² *Osborn v. Marquand*, 1 Sandf., 457; *Mann v. Whitbeck*, 17 Barb., 388; *Heritage v. Hall*, 33 id., 347. ³ 36 N. H., 311; *Gorham v. Fisher*, 30 Vt., 428.

his option to receive the goods sold or not, or has done something to deprive him of his option.

§ 316. In *Bog Lead Mining Co. v. Montague*,¹ it is held that in a contract for the purchase of unascertained property to answer a particular description, no acceptance can properly be said to take place until the vendee has exercised the right of rejection. For the reason that the offer of purchase is subject to the assent or dissent of the vendee. Such final and complete acceptance should follow, not precede, that of the seller.

"But," says Willes, J., "where the contract is for a specific ascertained chattel, the reasoning is altogether different.

"Equally where the offer to sell and deliver has been first made by the seller and afterwards assented to by the buyer, and where the offer to buy and accept has been first made by the buyer and afterwards assented to by the seller, the contract is complete by the consent of both parties, and it is a contract the expression of which testifies that the seller has agreed to sell and deliver and the buyer to buy and accept the chattel." In the latter case, it has been held that the statute of frauds may be satisfied by an acceptance preceding the delivery.²

§ 317. An important English case, upon the question of acceptance of goods sold by sample, is *Morton v. Tibbett*.³ There the defendant verbally agreed to purchase of the plaintiff "fifty quarters of wheat," each quarter to be a specified weight. A general carrier, selected by the defendant, received the wheat on board lighters for conveyance by canal to Wisbeach.

Before the wheat arrived at Wisbeach, the defendant, by the same sample he had purchased, resold the wheat under

¹ 10 C. B. N. S., 481.

² *Cusack v. Robinson*, 1 B. & S., 299.

³ 15 Q. B., 428; *Bushell v. Annaman*, 15 Adol. & E. (N. S.), 428. For disapproval of *Morton v. Tibbett*, see exchequer cases, *Hunt*

v. Hecht, 8 Exch., 814; *Coombs v. Bristol & Exeter, R. R. Co.*, 3 Hurl. & N., 510; *Castle v. Swarder*, 6 id., 832. But see *Currie v. Anderson*, 2 El. & El., 598; *Strong v. Dodds*, 47 Vt., 358.

an agreement that it should be of the same weight per quarter as was agreed upon with the plaintiff. Upon examination, the wheat was rejected as being short in weight. The defendant accordingly refused to receive it for the same reason, and it remained in possession of the carrier.

At the trial the jury found the wheat to be equal to sample and they rendered a verdict for the plaintiff.

The appellate court held that the verdict was justified by the evidence, and that the jury properly found an acceptance and actual receipt on the part of the defendant.

After stating that acceptance is to precede or to be contemporaneous with the actual receipt of goods, and not a subsequent act after the goods have been actually received, weighed, measured, or examined; and that it must be open to the buyer to object to the quantity and quality of the residue; and even where the sale is by sample, that the residue offered does not correspond with the sample, Lord Campbell says:

“We are of opinion that there may be an acceptance and receipt within the meaning of the act without the buyer having examined the goods, or done anything to preclude him from contending that they do not correspond with the contract. *The acceptance to let in parol evidence of the contract appears to us to be a different acceptance from that which affords conclusive evidence of the contract having been fulfilled.*”

Commenting on the last clause of the above opinion, Mr. Benjamin observes that the question presented to the court may be, whether there was a contract, or it may be whether the contract was fulfilled.

Lord Campbell further declared “that, although the defendant had done nothing which would have precluded him from objecting that the wheat delivered to the carrier was not according to the contract, there was evidence to justify the jury in finding that the defendant accepted and received it.”

One of the grounds for holding that there was an accept-

ance seems to have been that the defendant resold the wheat before examination. All this was such an exercise of ownership or dominion over the goods, concludes the same writer, as is inconsistent with a continuance of the right of property in the vendor, and a justification for the jury to find an acceptance and an actual receipt by the buyer under the statute.

The decision seems to go to the extent of holding that such a receipt amounts to an acceptance of the part taken in at the warehouse of the vendee, but not as to the part not yet delivered. As this was an entire contract, it would seem that a rejection of the instalment delivered would be a rejection of the whole.

And the case of *Marshall v. Green*¹ goes to the point that a sub-sale, standing alone, where the vendee has done nothing to the property sold, would not be evidence of an actual receipt.

§ 318. In *Simpson v. Krumdick*,² Gilfillan, Ch. J., reviewing the opinion of Lord Campbell in *Morton v. Tibbett*,³ where it is said that the acceptance to let in parol evidence of the contract appears to be a different acceptance from that which affords conclusive evidence of the contract having been fulfilled, observes: "It may be doubted that this general proposition is correct. It is claimed the correct statement of the law is, that where receipt and acceptance of part of the goods is relied on to make the contract valid, the acceptance of such part must be the ultimate acceptance of that part as a part performance of the contract of sale, leaving no right in the buyer to subsequently reject the part so accepted; . . . though he may not be precluded from questioning the quality or quantity of the residue."

§ 319. In *Kibble v. Gough*⁴—which case affirms *Morton v. Tibbett*,⁵ decided by the queen's bench a quarter of

¹ 1 C. P. Div., 35.

² 28 Minn., 352.

³ 15 Q. B., 428.

⁴ 38 Law Times Rep., N. S., 204.

⁵ 15 Queen's Bench, 428.

a century before — there was no memorandum in writing, and the question was whether the defendant had accepted and actually received the goods. The sale was by sample.

The defendant verbally agreed to purchase a specific quantity of barley of the plaintiff, upon the terms that the bulk should be well dressed and equal to sample. The plaintiff delivered an instalment of the barley to the defendant, whose foreman received it and gave a receipt for it as “not equal to sample.” The next morning the defendant himself inspected the bulk, and wrote a letter immediately to the plaintiff, refusing to accept the barley on the ground that it was not well dressed nor equal to sample.

On the trial the jury found that the goods *were equal to sample*, and gave a verdict for the plaintiff.

The court asserts the English rule as to the sufficiency of evidence of acceptance of goods within the meaning of the statute of frauds. Bramwell, L. J., said: “There is no doubt about the delivery of the first thirteen quarters; was there an acceptance of them? I will not say that the decision in *Morton v. Tibbett* was wrong; on the contrary, I think it was right. A man may accept goods without losing his right of objection to them; there must be such an acceptance to satisfy the statute as amounts to a recognition of the contract between the parties.” In *Morton v. Tibbett* the goods were taken in by the buyer, and were dealt with for a short time, but were not kept for so long a time that the buyer would have had no power to reject them if they had proved not to be equal to sample. In *Page v. Morgan*,¹ Brett, M. R., referring with approval to the decision in *Kibble v. Gough*, says: “In a case where goods are delivered, and the buyer takes possession of them and deals with them, if he could not do so unless he had made a contract, and unless the goods had been delivered in fulfillment of that contract, there is evidence for the jury of an acceptance to satisfy the statute.” There the court held

¹ 33 Weekly R., 793.

that there was evidence of an acceptance sufficient to satisfy section 17 of the statute of frauds, notwithstanding the fact that immediate notice was given to the vendor that the goods were not equal to sample and they refused to accept them.

§ 320. The case of *Page v. Morgan*¹ is one of the most recent and pronounced English authorities as to acceptance under section 17 of the statute of frauds. There was no memorandum in writing of the contract; but in pursuance of a verbal agreement, the plaintiff sent a large number of sacks of wheat by barges to the defendant's mill. They arrived in the evening. The next day some of the sacks were put in the warehouse of the defendant and the wheat was examined. The defendant's foreman stopped any further delivery on the ground that the wheat was *not equal to sample*, and the bulk of the wheat remained in the barges. There the same remained until after the commencement of this action, when, by order of the court, it was sold and realized £44 less than the agreed price.

The jury rendered a verdict for the plaintiff, and they found, also, that the bulk of the wheat *was* equal to sample.

Upon a judgment, sustaining the court below, after referring to the fact that the foreman examined the wheat, Brett, M. R., said: "I cannot see how he could do that unless he knew that there was a contract, and that the wheat had been delivered in pursuance of the contract, and therefore the jury were entitled to say that he examined the wheat in order *to ascertain whether it was equal to sample.*"

He further says: "How reasonable men could come to any other conclusion except that the defendant admitted that there was a contract relating to wheat, . . . I am unable to understand. No doubt there might be circumstances attending the delivery of goods which would not lead to a similar conclusion, as, for instance, if the person to whom the goods were delivered refused to allow them

¹33 Weekly Rep., 793; 53 L. T. N. S., 126, S. C.

to remain on his premises or to have anything to do with them. In such a case, although there would be a delivery, there would be no acceptance. I rely not only on the delivery and the fact that the goods were in the defendant's warehouse, but on the fact that he examined them, and by doing so admitted that there was a contract. That is all that is necessary to justify the verdict of the jury. The case of *Kibble v. Gough*¹ is a decision which is binding on this court, but I do not think that *Rickard v. Moore*² was decided under such circumstances as to be binding on us in the present case. For these reasons I am of the opinion that there is no color for the suggestion that there was any misdirection at the trial, and that being so, the decision of the divisional court was correct, and this appeal must be dismissed."

§ 321. Concurring in the above opinion, Baggallay, L. J., said: "The decisions in *Morton v. Tibbett* and *Kibble v. Gough* show that there may be an acceptance and receipt sufficient to satisfy the provisions of section 17, although the circumstances are not such as to preclude the purchaser from afterwards rejecting the goods on the ground that they are not equal to sample. It is true that there was some difference of opinion in the old cases as to what constituted a sufficient acceptance, but the question seems now to be settled, for *Kibble v. Gough* affirmed *Morton v. Tibbett* after that decision had stood for nearly twenty-eight years. In *Rickard v. Moore* there is a distinction as to the facts, and there is also this distinction, that the jury in that case found that the goods were not equal to sample. Here, and in the other two cases to which I have referred, the jury found the contrary. I have no doubt that there was evidence to go to the jury in the present case, and that their verdict was right."

Bowen, L. J., thought *Kibble v. Gough* was controlling. He said: "An acceptance and receipt is the condition on which the validity of the contract depends, and one would

¹ 38 L. T. Rep. N. S., 204.

² 38 L. T. Rep. N. S., 841.

expect that the legislature would mean that it should amount to an acceptance where the buyer was dealing with the goods in such a way as to recognize the existence of the contract of sale, and the fact that the goods had been sent to him under it. That is the effect of the decision in *Kibble v. Gough*. The decision in *Rickard v. Moore*, as to the acceptance, was merely on a secondary point, and I think that Bramwell, L. J., could not have meant to unsettle the law as laid down in *Kibble v. Gough*. Even if this were so, I am of opinion that, having the two cases in the court of appeal before us, we ought to go back to *Kibble v. Gough*, and follow that decision."

Appeal dismissed.

§ 322. As shown by the last three sections, the English doctrine is, that where there is a purchase by sample, and the goods are delivered in whole or in part, the fact of their delivery into the warehouse of the purchaser and an examination made by him, for the purpose of ascertaining whether they are equal to sample, as he has a right to do, is sufficient evidence of admission that he has made a contract to satisfy section 17 of the statute of frauds.

Thus, in *Page v. Morgan, supra*, the court, as a reason why there was an acceptance, relied "not only on the delivery and the fact that the goods were in the defendant's warehouse, but on the fact that he examined them, and by doing so admitted that there was a contract." And further, the court declared that, if the person to whom the goods were delivered refused to allow them to remain on his premises, or to have anything to do with them, there would be no acceptance.

The questions at once arise: How is the person to whom the goods are sent to determine whether he will allow them to remain on his premises or accept them until he has had the opportunity of examining them; and why an immediate notice from the vendee that he does not accept the goods is not equivalent to a refusal to allow them to remain on his premises? Such notice would seem to be a part

of the *res gestæ*. For the condition that the bulk should be equal to sample is the *sine qua non* to the validity of the *verbal contract*.

To hold that because a person acts in regard to goods delivered in pursuance of a verbal agreement as admits that he has made a contract, he has therefore accepted them, and is debarred from objecting to the portion delivered, would seem to be a violation of sound commercial usage as well as against the spirit and letter of the statute. To adopt the same mode of reasoning in regard to part payment, acceptance, or as to the memorandum, would virtually overturn many well established cases.

§ 323. A sound and consistent rule is laid down by Mr. Justice Blackburn. He says that so long as the buyer can, without self-contradiction, declare that the goods are not to be taken in fulfillment of the contract, he has not accepted them. And it is immaterial whether his refusal to take the goods bargained for be reasonable or not; or whether the reasons assigned be false or frivolous, if it be evidenced that he does not accept them, the question is not whether he *ought* to accept, but the real question always *is whether he has accepted them*.¹

§ 324. The facts in *Rickard v. Moore*² were as follows: The plaintiff verbally sold to the defendant six bales of wool, by sample. The goods were delivered by the plaintiff at a railway station, and from thence they were taken by the defendant to his own premises, and unpacked. The same day he wrote to the plaintiff, stating that two of the bales were *inferior to sample*, and added, "Please say what is to be done in the matter." The plaintiff answered denying the statement. Three days thereafter the defendant, who had been absent from home, read the plaintiff's letter, and sent the goods back to the railway station and telegraphed to the plaintiff, refusing to accept the goods.

Between the date of purchase and the refusal to accept (four days), the defendant offered the goods for sale, stat-

¹ Blackburn on Sales, 22, 23; Kent v. Huskinson, 3 Bos. & Pul., 233. ² 38 L. T. N. S., 841 (1873).

ing, however (according to his own evidence), that he had not accepted the goods, and that he would have to make other arrangements before he could sell them. At the trial the jury found that *two bales were not equal to sample*, and the judge directed a judgment for the defendant.

It was held, as there was no evidence of a sufficient acceptance and receipt of the goods within section 17, the judgment was rightly entered for the defendant.

In general the object of the statute is that where there is no contract in writing there must be some overt act to render the bargain binding. Bramwell, L. J., pointed out the distinguishing differences between the above case and that of *Kibble v. Gough*,¹ namely, that in the one case the jury found that the goods were equal to sample, and in the other that they were not.

§ 325. The case of *Smith v. Hudson*² arose out of a contract of sale of certain barley by sample. The contract was oral.

Four days after the bargain was made, the barley was delivered by the seller at the freight-house of a railroad, consigned to the order of the buyer, a place where he had delivered grain to the buyer on previous occasions, and where it was the buyer's custom to receive grain from other sellers.

It was the custom of the trade for the buyer to compare the sample of the goods with the bulk as delivered, and, if the examination was not satisfactory, to reject the goods. This right continued in this case, notwithstanding the delivery of the barley at the railroad company's freight-house. On September 9th the buyer became bankrupt, and on the 11th the seller notified the station-master not to deliver the barley to the buyer nor to his assignee.

The court held that there was no acceptance sufficient to satisfy the statute of frauds. The most that could be said was, there was a receipt. But as the carrier had no implied authority to accept, *there was no acceptance*.

¹ 38 Law Times R. (N. S.), 204.

² 6 B. & S., 436.

CHAPTER XVI.

OF SYMBOLICAL OR CONSTRUCTIVE DELIVERY.

§ 326. Rule of constructive delivery in the several states.

326a. A question for the court.

327. When will a symbolical delivery satisfy the statute of frauds.

328. Example of constructive delivery, with right to retain the whole until part purchased is separated.

329. Assumption of control over the property by the vendee, where its removal is impracticable, satisfies the statute.

330. Instance of symbolical delivery in the sale of a stock of goods, by delivery of the keys; *Gray v. Davis*.

331. Another example; order on warehouseman where the goods sold are stored, sufficient to constitute symbolical delivery; *King & Clopton v. Jarman*.

332. The rule in England as to constructive or symbolical delivery.

§ 326. It may be reasonably deduced from the well considered cases on the subject, that in those states where the provision of the statute of frauds as to acceptance and receipt provides that a sale of goods, chattels, or things in action, for the price mentioned or more, shall be void, "unless the buyer shall accept and receive part of such goods, or the evidences, or some of them, of such things in action,"¹ a symbolical or constructive delivery would satisfy the statute, provided the minds of the contracting parties meet upon that question, and it is so intended and unequivocally understood between them.²

¹ California, Dakota, New York, Nevada, Minnesota, Wisconsin, Montana, Wyoming.

² *Parker v. Jervis*, 3 Abb. Ct. App. Dec., 449; *Gray v. Davis*, 10 N. Y., 285; *Mechanics'*, etc., *Bank v. Farmers'*, etc., *Bank*, 60 N. Y., 40; *Hayden v. Demets*, 53 id., 426; 34 Super. Ct. R., 344; *Carver v. Lane*,

4 E. D. Smith, 168; *Walden v. Murdock*, 23 Cal., 540; *Alderton v. Buchoz*, 3 Mich., 328; *Cartwright v. Phoenix*, 7 id., 281; *Clark v. Draper*, 19 N. H., 419; *Denny v. Williams*, 5 Allen, 1; *Wilkes v. Ferris*, 5 Johns., 335; 3 Com. Law R., 1037, as to the rule governing cases which involve constructive or sym-

Even in other states such a delivery has been decided to be good and valid.

. It must appear in all such cases that it was the express intention of the parties so to make the delivery. But the courts are justly careful not to carry the rule too far, for the danger always is that if the principle of symbolical delivery be carried beyond reasonable limits it might result in a judicial repeal of the important clause of the statute as to acceptance and receipt.

Doubtless the leaning of the courts should be in all cases towards the plain and common sense meaning of the statute of frauds.

§ 326*a*. It is for the court to determine whether the evidence of a constructive delivery of goods is sufficient to satisfy the statute of frauds. And likewise its province to withhold the evidence from the jury when it is not such as can in law warrant finding an acceptance; though there be a scintilla of evidence tending to show an acceptance, the court might still feel bound to set aside the verdict.¹

§ 327. If an article is ponderous and not susceptible of manual custody, a symbolical or constructive delivery will be equivalent in its legal effect to an actual delivery and receipt. Thus, in the sale of an article of such a character, when the seller has done everything contemplated by the contract, and which under all the circumstances could be done to deliver it, the buyer having unequivocally accepted such acts of the seller, the statute of frauds is satisfied.²

It should be constantly borne in mind that there is a dis-

bolical delivery. See, also, *Audenreid v. Randall*, 3 Clifford, C. C. R., 104; *Leonard v. Davis*, 1 Black (U. S.), 476; *Wyoming National Bank v. Dayton*, 102 U. S., 59.

¹ *Browne*, St. Frauds, sec. 321; *Benjamin on Sales*, secs. 148, 149, 163 and 175; *Denny v. Williams*, 5 Allen, 5; *Howard v. Borden*, 13 Allen, 299; *Caulkins v. Hellman*, 47 N. Y., 449; *Story on Sales*, sec. 311; *Kealy v. Tenant*, 13 Ir. C. L. R., 394.

² *Mueller v. Guye*, 12 Mo. App. R., 589; *Leisherness v. Berry*, 38 Me., 83; *Bethel Steam Mill Co. v. Brown*, 57 id., 9; *Adams v. Foley*, 4 Clarke (Iowa), 52; *Montgomery v. Hunt*, 5 Cal., 366; *Ricker v. Cross*, 5 N. H., 571.

inction between a sale and a contract of sale. Hence, a mere contract to sell, without any acts of delivery either actual or symbolical, will not pass the title to the property.¹ And in every case, whether the acts and circumstances constitute a constructive or symbolical delivery, it is a question of fact for the jury.²

The pointing out a quantity of logs afloat in a boom has been held sufficient. For it was equivalent in its legal effect to an actual delivery, as it was such as the nature of the case admitted of.³

§ 328. A rule of interpretation has been adhered to in some of the more recent cases which admits of a constructive or symbolical delivery. But these cases do not come up to dispensing with acts of the parties as a requisite to satisfy the statute of frauds.

In *Lamprey v. Sargent*,⁴ the plaintiff, by a written bill of sale, bought of the defendant "six holes" of hard brick. The brick were, at the time, in six holes, but intermingled with a quality known as "light red brick." On the same day the plaintiff took two bricks, and in a day or two thereafter four thousand bricks from the six holes. Upon these facts it was held that there was a constructive delivery to the plaintiff of the six holes of brick, with the right to retain the possession of the whole for a reasonable time, to enable him to select therefrom the hard bricks and leave the light red for the vendor; that it was an executed sale as between the parties, and passed the title to the hard bricks to the plaintiff.⁵

In general it is held that in case of a sale of a part of an entire mass of goods, such as flour, grain, brick or coal, if

¹ *Penniman v. Hartshorn*, 13 Mass., 87.

² *Pinkham v. Mattox*, 53 N. H., 605; *Frostburg Mining Company v. New England Glass Company*, 9 Cush., 118; *Edin v. Dudfield*, 1 Q. B., 302; *Jewett v. Warren*, 12 Mass., 300.

³ But if the article be capable of convenient manual delivery, the rule is otherwise. *Solomons v. Chesley*, 58 N. H., 238.

⁴ 58 N. H., 241, *Bingham, J.*

⁵ *Page v. Carpenter*, 10 N. H., 77.

the purchaser is allowed to take possession of the whole so that he may separate the particular part sold, the title to that part passes to the purchaser, and he may retain the whole until he has had a sufficient opportunity to separate and take the part belonging to him.¹

§ 329. In *Cook v. Mann*,² Elbert, C. J., correctly states the rule as to what will be deemed a sufficient delivery in certain cases, thus: "When the subject of the sale does not reasonably admit of an actual delivery, it is sufficient if the vendee assume the control and dominion of the property so as reasonably to indicate to all concerned the change of ownership."

The case of goods in a warehouse, brick in a kiln, and lumber in a raft, are familiar illustrations where removal is not impossible, but unusual and out of the regular course of trade.

In such cases, if there is a full surrender upon the part of the vendor, and a full assumption upon the part of the vendee of the control and dominion of the subject of the sale, the delivery is sufficient and satisfies the statute.

There was one Haywood in business at 228 F. street. On December 31, he sold his stock of boots and shoes to Mann. An invoice was made and delivered on that day, and next day Mann took possession. He immediately put his sign, "J. O. Mann & Co.," over the door, and continued business there about two months and then moved his goods to 284 F. street, where he continued business for two or three months under the same firm name, when they were attached as the goods of Haywood. During all this time his control over the goods was such as is usual with persons engaged in merchandising in their own name. All the *in-*

¹Story on Sales, 314, n. 3; *Weld v. Cutler*, 2 Gray, 195; *Damon v. Osborne*, 1 Pick., 476; *Crofoot v. Bennett*, 2 N. Y., 258.

²2 Col. Law Jour., 286. See, also, on the same general question, *Clafflin v. Rosenberg*, 42 Mo., 439; *Men-*

zies v. Dodd, 19 Wis., 343; *Douglas v. Garrett*, 5 id., 85; *Cotterill v. Stevens*, 10 id., 422; *Lunn v. Hoag*, 31 id., 687; and *Bossinger v. Spangler*, 10 Pacific R., 809, a Colorado case.

dicia of ownership usual in mercantile business were present.

The court found no difficulty in saying in this case "that the requirements of the statute were fully satisfied."

§ 330. *Gray v. Davis*¹ was an action to recover the price of a stock of goods. The pivotal question was, whether there had been an acceptance and receipt, symbolical or constructive.

The stock consisted of umbrellas, which were in the first and third lofts of the store. The bargain was made at noon on the 1st of April. In February previous, the appellant had taken an inventory of the stock, which was examined by the respondent. The sale was to be on a credit of "twelve months," and the respondent was to take the two lofts in which the goods were.

When the verbal agreement was made, the appellant told the respondent to "consider the goods and premises his at once;" to which he responded, "I cannot attend to it now, but will come at 4 o'clock and take possession and inventory the stock." During the interim, the appellant, with the assent of the respondent, delivered to a customer certain umbrellas which had been previously sold.

At the hour appointed, the parties met at the store and took an inventory, the respondent and the clerk of the appellant calling off the goods, and the appellant taking an account of them. The caption of this inventory read:

"MR. CHARLES DAVIS,

Bought of E. C. GRAY."

The stock was taken, the prices put down from the inventory of February, except the umbrella frames which were up stairs. They were not counted, but taken down from the February inventory, and it was agreed that the respondent should count them afterwards, and if he found any error, it should be corrected. The respondent made no objection to the inventory, and requested the appellant to give him a copy of it in the morning.

¹ 10 N. Y. Rep. 286, Court of Appeals, 1851.

The appellant then directed the clerk to hand the keys of the store to the respondent; but the latter said he did "not want to take them till morning; that his rent was not to commence till then, and that he had no insurance." The appellant replied: "I will give you my policies of insurance on the stock." The respondent then directed the clerk to take the keys for him till morning, and the clerk did so. The sign of Gray was then taken down in the presence of Davis.

Next morning Davis refused to take the stock. On these facts, the judge at the trial ruled that there was not sufficient evidence of delivery and acceptance to submit the question to the jury, and ordered judgment for the defendant.

On appeal, the general term of the court of common pleas, Woodruff, J., held that, as something remained to be done, there was no delivery, and cited *Rapelye v. Mackie*,¹ where weighing and designation of the particular bales remained to be done by the vendor; *Outwater v. Dodge*,² where transportation and inspection of the fish sold remained to be done by the vendor; *Ward v. Shaw*,³ where slaughtering and weighing the cattle sold remained to be done by the vendee, to ascertain the price, etc.; and *Andrews v. Dietrich*,⁴ where the vendee was to measure and cut off the desired quantity of carpeting.

After declaring that "the acceptance must be final, complete and irrevocable," and that the goods must come into the absolute possession of the purchaser, citing *Story on Sales*,⁵ and *Shindler v. Houston*,⁶ he held that the case was correctly disposed of at the trial, and affirmed the judgment.

But the court of appeals decided that the general term erred, not so much in taking the case from the jury, as in deciding that there was not a delivery and acceptance.

¹ 6 Cowen, 250.

² 7 Cowen, 85.

³ 7 Wendell, 404.

⁴ 14 Wendell, 31; *Donner v. Thompson*, 2 Hill, 137.

⁵ Sections 275, 280.

⁶ 1 Comstock (N. Y.), 265.

The opinion of the appellate court¹ rested upon the fact that, after the taking of the inventory, all that remained to be done to render the *delivery* and the *acceptance* of the stock of goods perfect was to hand the respondent the keys and for him to *receive* them, both of which were done. It was the only remaining act which could be done to complete the business. That the parties themselves so considered it; for when it was done, the appellant's sign was taken down in the presence of the respondent, and without objection from him.

Clearly the minds of the parties met on the matter of the contract; they agreed in all respects as to the inventory, the price, and the terms of sale; and the delivery and acceptance of the keys, under the existing circumstances, was in itself sufficient to take the case out of the statute of frauds.²

§ 331. An interesting case involving the question of symbolical delivery is that of *King & Clopton v. Jarman*.³

There Jarman, the plaintiff, recovered a judgment against King & Clopton in an action for the price of six bales of cotton claimed to have been sold to them, but which was denied.

The defendants appealed. They were merchants and cotton buyers at Helena. They kept an account with Jarman, who was a customer. Jarman had six bales of cotton in a warehouse there for sale which had been weighed and

¹Paige, McCoun and Jewett concurred; Gardiner, J., writing a short opinion, held that "the question of delivery should have been submitted to the jury." Ruggles, J., was for affirmance, for the reasons given by the court below; Gray, J., took no part in the decision.

²See 2 Kent's Comm., 4th ed., 500, and cases there cited. In *Parker v. Jervis*, 3 Abb. Ct. App. Dec., 449, where the keys of the

repository were delivered and it was held a sufficient delivery; *Vining v. Gilbreth*, 39 Me., 496; *Packard v. Dunsmore*, 11 Cush., 282; *Ludwig v. Fuller*, 17 Me., 166; *Ellis v. Hunt*, 3 T. R., 464; *Chaplin v. Rogers*, 1 East, 192; *Wilkes v. Ferris*, 5 Johns., 335; *Chappel v. Marvin*, 2 Aiken, 79; *Calkins v. Lockwood*, 17 Conn., 164; *Stinson v. Clark*, 6 Allen, 340.

³35 Ark. R., 191.

marked for identification. He produced samples of the cotton taken February 15, 1877, to Clopton, who made him an offer to purchase the cotton at a certain price, which offer was accepted. The price was ten and one-half cents for three bales, and eleven and three-fourths cents per pound for the other three.

The following order on the warehouseman was given:

“HELENA, ARK., February 15, 1877.

“Messrs. Paul F. Anderson & Co. will deliver my six bales of cotton to Messrs. King & Clopton, three bales marked ‘A. G. J. (S.),’ and three bales ‘S. M. R.’

“A. G. JARMAN.”

He told Clopton he could find the weights on the bales, and to place the amount of the sale to his credit, to which Clopton replied: “Very well. All right. I will send Dick Cook down to attend to it.” On this point the evidence was somewhat conflicting. During that night the warehouse was destroyed by fire, and only one of the bales in question was saved.

The appellants claimed that the verdict was against the law and evidence, and void under the statute of frauds.

The case turned principally on the point whether there had been an acceptance and receipt of the cotton by King & Clopton, by symbolical delivery.

The court, Eakin, J., said: “With regard to bulky articles, or those not immediately accessible, symbolical delivery, by something which may be proved *in pais* of a satisfactory nature, satisfies the reason and policy of the statute.”¹

As to the title passing, he said: “Where the minds of the parties have assented to the present purchase and sale of a specific chattel, which may be clearly identified, and

¹ Puckett v. Read, 31 Ark., 132; of sale the property vests in the Little Rock & Fort Smith Railway vendee, or remains in the vendor, Co. v. Page, 35 id. (1 Turner), 315; is, could the vendee recover the Pierce v. Lyman, 28 id., 554. The property from the vendor, test as to whether upon a contract

separated from other property, and the sale be dependent on no conditions nor contingencies, and such possession be given as the nature of the subject and the situation of the parties with regard thereto will permit of, and the vendor has done all that is required of him with respect to the property, *the title will pass*. And this will be so, notwithstanding something may be still necessary, on the part of the vendee, to ascertain the exact price. *That, where this is intrusted to the vendee, it is a matter of confidence not affecting the sale.*

“One may sell and transfer to another a specific lot of neat cattle, for instance, to be paid for at so much per pound when butchered and sold; or a hogshead of meat, to be weighed by the vendee on taking it to his house, and paid for by the pound at a fixed rate. These things enter into the daily course of traffic, and it would be highly embarrassing to hold that, in such case, title did not pass to the vendee until all should be done by both parties to fix quantity, quality or price.”

The court accordingly affirmed the judgment. It is always sufficient if the agreement be definite and unconditional, and everything has been done in pursuance of it; on the part of the vendor, which may be necessary to identify the property, and separate it from others, so as it may be known what, specifically, has been sold.

§ 332. Although constructive, the acceptance must be unequivocal; as by delivery of the key of the warehouse in which the goods are stored, since the larger the bulk the more impracticable it is that there should be a manual receipt. In the nature of things there must be a constructive delivery.¹ And in almost every case it is a question for the

¹ *Maberly v. Shepperd*, 10 Bing., 426; *Tucker v. Ross*, 19 U. C. Q. 101; *Chase v. Willard*, 57 Me., B., 295; *Doyle v. Lasher*, 16 U. C. 157; *Boynton v. Veazie*, 24 id., C. P., 263; *McMartin v. Moore*, 286; *Shurtliff v. Willard*, 19 Pick., 27 id., 397; *Waldron v. Murdock*, 210; *Jewett v. Warren*, 12 Mass., 23 Cal., 540, where sheep were branded; see *Barney v. Brown*, 2 349; *Hatch v. Lincoln*, 12 Cush., Vt., 374, where it was held not a sufficient constructive delivery. 31; *Hayden v. Demets*, 53 id.,

jury whether, under all the circumstances, the acts which the buyer does or forbears to do amount to an acceptance, or otherwise.¹

It seems to be settled that there cannot be any acceptance unless there has been such a delivery on the part of the purchaser as to deprive the seller of his right of lien.² Whether the dealing must also have been such as to deprive the buyer of any right to object to the quality or quantity of the goods, some difference of opinion seems to prevail in the cases.³

And as to the distinction between acceptance and receipt in such cases, see note.⁴

¹ *Morton v. Tibbett*, 15 Q. B., 441. A., 557; *Norman v. Phillips*, 14 M.

² *Smith v. Surman*, 9 B. & C., 577; & W., 277; but see late case, *Bushel Bill v. Bament*, 9 M. & W., 41; *v. Wheeler*, 15 Q. B., 428, 434, 443, *Carter v. Toussaint*, 5 B. & A., 855; and *Parker v. Wallis*, 5 E. & B., 26. *Dodsley v. Varley*, 12 A. & E., 632.

³ *Hunt v. Hecht*, 8 Exch., 814; 123; *Farmer v. Horne*, 16 M. & W., 734. *Marvin v. Wallis*, 6 E. & B., 734. *Tempest v. Fitzgerald*, 3 B. & A., 680; *Hanson v. Armitage*, 5 B. &

CHAPTER XVII.

OF CONDITIONAL SALES.

- § 333. The statute of frauds in no wise affects sales made on condition.
- 334. Meaning of unconditional and conditional sales.
- 335. Title of property remains in vendor until the condition in the contract is performed.
- 336. The rule held to be inflexible; *Gibbs v. Benjamin*.
- 337. Example where action could not be maintained.
- 338. Another example; *Williams v. Burgess*.

§ 333. As has been frequently remarked, the statute of frauds simply affects the mode of proof of contracts falling within it.

The statute does not affect the validity of conditional sales. The rights of parties under and in relation to them remain the same. Although it is not within the scope of this treatise to touch upon subjects which are not affected by the statute of frauds, it has been thought well to give the general law and meaning of conditional sales, as at least somewhat germane to the subject of this work.

§ 334. Sir Cresswell Cresswell, in *Gilmour v. Supple*,¹ observes that, "by the law of England, by a contract for the sale of specific ascertained goods, the property immediately vests in the buyer, and a right to the price in the seller, unless it can be shown that such was not the intention of the parties." This was pronounced by Mr. Justice Blackburn, in *The Calcutta Company v. De Mattos*,² to be "a very accurate statement of the law."

Such is the law as to sales of specific goods or chattels unconditionally.

On the other hand, a very clear and elaborate judgment on the law of a sale on conditions was rendered by Mr. Chief

¹ 11 Moore, P. C., 566.

² 32 L. J. Q. B., 322, 328.

Justice Cooley, in *Wilkinson v. Holiday*.¹ Therein he said: "Where, under a contract for the purchase of personal property, something remains to be done to identify the property, or to put it in condition for delivery, or to determine the sum that shall be paid for it, the presumption is always very strong that by the understanding of the parties the title was not to pass until such act had been fully done and accomplished. But the presumption is by no means conclusive.

"If one bargains with another for the purchase of property, and that is done in respect to it which the parties agree shall pass the title, nothing more is generally requisite. The question is only one of mutual assent; whether the minds of the parties have met, and by their understanding the purchaser has now become the owner.

"This is the general rule where the case is not within the statute of frauds.

"If one purchases gold bullion by weight and receives delivery before it has become convenient to weigh it, and on the understanding that the weighing shall be done afterwards, there can be no reasonable doubt, unless there are some qualifying circumstances in the case, that the bullion has now become his property and is at his risk."

§ 335. Another succinct and satisfactory definition of a conditional sale is that of Mr. Justice Colt, in *Foster v. Ropes*.² He said: "In the sale of personal property, the general rule of law is, that where, by the terms of the contract, the seller agrees to do anything for the purpose of putting the property into a state in which the buyer is bound to accept it, or into a condition to be delivered, the title will remain in him until he has performed the agreement in this respect." After referring to and stating the case of *Rugg v. Minett*,³ he adds, "that this general rule will not prevail where, by the terms of the agreement, the title is to vest immediately in the buyer, notwithstanding some-

¹ 33 Mich., 386, 388. See *Lingham v. Eggleston*, 27 Mich., 324.

² 111 Mass., 10.

³ 11 East, 210.

thing remains to be done to the goods by the seller before delivery." The intention of the parties as to when the title is to pass is ascertainable only from the terms of the agreement, as expressed in the language and conduct of the parties.

§ 336. So also Mr. Justice Redfield, in *Gibbs v. Benjamin*,¹ has stated the rule of law on this general subject.

"The principle is well settled," he says, "and uniform in all cases, that when anything remains to be done by *either or both of the parties*, precedent to the delivery, the title does not pass. And so inflexible is the rule, that when the property has been delivered, if anything remains to be done, by the terms of the contract, before the sale is completed, the property still remains in the vendor.

"The contract must be executed, to effect a completed sale, 'and nothing further to be done to ascertain the quantity, quality, or value of the property.'"

In *Fuller v. Bean*,² Bell, J., said: "If the goods are sold by number, weight, or measure, the sale is *prima facie* not complete till their quantity is ascertained, and if they are mixed with others, not until they are separated and designated."

§ 337. It was held by Denman, J., in *Elphick v. Barnes*,³ where a horse was sold upon condition that it should be taken away by the buyer and tried by him for eight days, and returned at the end of the time if the buyer did not think it suitable for his purposes, and the horse died on the third day after it was put in the buyer's stable, without any fault of either party, that the seller could not maintain an action for the price as for goods sold and delivered.

¹ 45 Vt., 124; *Hutchins v. Gilchrist*, 23 Vt., 88.

² 34 N. H., 290. See, also, *Adams v. O'Conner*, 100 Mass., 515; *Stone v. Perry*, 60 Me., 48; *Dudley v. Abner*, 52 Ala., 572; *Simmons v. Swift*, 5 B. & C., 857.

³ L. R., 5 C. P. D. 321. See, also, *Armington v. Houston*, 38 Vt., 448;

Miller v. Bascom, 28 Mo., 352; *Marston v. Baldwin*, 17 Mass., 606; *Herring v. Hoppock*, 15 N. Y., 409; *Connor v. Giles*, 76 Me., 132; *Rourke v. Ballens*, 8 Gray, 549; *Maynard v. Anderson*, Ct. App., 9 Alb. L. Jour., 262; *Adams v. Farr*, 2 Hun. 473.

§ 338. In the case of *Williams v. Burgess*,¹ it appeared that the plaintiff entered into a verbal contract with the defendant to sell him a mare for 20*l.* upon the understanding and condition that if the mare should prove to be in foal the defendant would, upon receiving 12*l.*, return it on request. The particular event having happened, the plaintiff tendered 12*l.* to the defendant, but he refused to return the mare.

On these facts it was substantially held that the contract to return the animal, as stated, was not a distinct contract of sale, but a condition of the original sale; and that the delivery of the mare to the defendant took the contract out of the statute of frauds, enabling the plaintiff to sue. *Patterson, J.*, said: "It is one entire contract, and not two distinct contracts. It is a sale on the terms that the mare and part of the price should be returned on a certain event. If, indeed, the defendant had agreed to sell to the plaintiff the foal, the case might have been different."

In all such cases it depends upon the fact whether the transaction is complete in itself to render it an entire contract.

¹ 10 A. & E., 499. But see *Watts v. Friend*, 10 B. & C., 446, where the bargain was to sell to the plaintiff a different thing. *Browne on Stat. of Fr.*, 293; *Wooster v. Sage*, 67 N. Y., 67; *Fay v. Wheeler*, 44 Vt., 292; *Hogar v. King*, 38 Barb., 200; *Paige v. Clough*, 1 Alb. L. J., 163; *Dickinson v. Dickinson*, 29 Conn., 600.

CHAPTER XVIII.

OF RECEIPT OF GOODS BY CARRIER.

- § 339. When will delivery of goods to a carrier amount to an acceptance by the vendee.
340. Proof of acceptance through the carrier must be unequivocal.
341. An agent or carrier legally authorized may accept goods for the vendee.
342. A delivery of goods under a valid written contract to a carrier therein designated will pass the title.
343. Effect of delivery of goods to carrier before acceptance; the case of *Rodgers v. Phillips*.
344. The same subject continued.
345. Under a verbal contract, a delivery of goods to a carrier, or at a place designated, does not work an acceptance.
346. A carrier selected by the purchaser is his agent; *Magruder v. Gage*.
347. Delivery to a common carrier sufficient, where the word *acceptance* does not appear in the statute, as in Iowa; the case of *Bullock v. Stcherge*.
348. Of action against carrier.
349. Where the contract is invalid, right of action against carrier in consignor; otherwise where contract is written; *Keiwert v. Meyer*.
350. Instance of a verbal contract; *Simmons Hardware Company v. Mullen*.
351. Another example; *Rindskopf v. De Ruyter*.
352. Where the agent of the purchaser designates the carrier.
353. Carrier designated by the buyer; may be done by agent.
354. Case of acceptance without delivery; *Grey v. Cary*.
355. Another example; *Allard v. Greasert*.
356. When carrier becomes liable for loss.
357. Delivery of goods to a designated carrier.
358. Where there has been a prior acceptance, carrier may recover.

§ 339. In general, the duty of a carrier is simply to receive goods for transportation to the buyer. After goods have been accepted by the buyer a delivery of them to a carrier designated in the contract, *a fortiori*, to a carrier of the buyer's own selection, will satisfy the statute of frauds.

Such delivery is tantamount to an actual receipt, for such a carrier is *pro hac vice* the buyer's agent.

But a delivery of goods to a common carrier for transportation to the vendee will not in any legal sense constitute an acceptance by the vendee.¹

Nor will a delivery of goods to a carrier selected by the vendor, where it is done in compliance with the terms of a void contract, amount to an acceptance.

But after goods have been accepted by the vendee, a delivery of them to a common carrier will be considered a receipt by him.

These deductions seem to be in harmony with the well-considered cases. And it is for the jury in all such cases to say whether, under all the surrounding circumstances, there has in fact been an acceptance by the buyer.

§ 340. In *Johnson v. Cuttle*² goods were delivered by the plaintiffs to a steamboat line as common carriers, and by them taken from New York to Fall River, and there landed and lodged by them in their warehouse.

Gray, J., in his opinion, says: "Viewing the facts proved at the trial in the light most favorable to the plaintiffs, it is clear there was no such acceptance and receipt of any part of the goods by the buyer as will satisfy the statute. Mere delivery is not sufficient; there must be unequivocal proof of an acceptance and receipt by him. Such acceptance and receipt may indeed be through an authorized agent. But a common carrier (whether selected by the seller or by the

¹ *Waldron v. Romaine*, 22 N. Y., 368; *Dalton v. Solomon*, 3 Bos. & Pul., 582; *Putnam v. Tillotson*, 13 Met., 517; *Orcutt v. Nelson*, 1 Gray, 536; *Merchant v. Chapman*, 4 Allen, 362; *Strong v. Dodds*, 47 Vt., 348; *Benj. on Sales*, 181.

² 105 Mass., 447; *Nicholson v. Bower*, 1 El. & El., 173. In *Norman v. Phillips*, 14 Mees. & Wels., 277, the legal effect of delivery of goods at a railway station, to be for-

warded to the vendee, in pursuance of the terms of a verbal contract of sale, is discussed, and the leading English cases reviewed. For leading decisions in this country on that general subject, see *Rodgers v. Phillips*, 40 N. Y., 519, and *Cross v. O'Donnell*, 44 id., 661; *Benjamin on Sales*, 160; *Taylor v. Muller*, 30 Minn., 343; *Atherton v. Newall*, 123 Mass., 141; *Spencer v. Hale*, 30 Vt., 315.

buyer), to whom the goods are intrusted *without express instructions to do anything but to carry and deliver them to the buyer*, is no more than an agent to carry and deliver the goods, and has no implied authority to do the acts required to constitute an acceptance and receipt on the part of the buyer, and to take the case out of the statute of frauds."

§ 341. Where the carrier or middleman has authority to accept goods for the vendee, and receives them as such agent, that will be tantamount to an acceptance on the part of the principal.

While under the common law a delivery to the proper carrier is constructive delivery to the vendee, to render a sale valid under the statute, in the absence of the other requisites, there must be a complete delivery, and an authorized and unconditional acceptance.¹

Hence it follows that, while a receipt of goods by a carrier, or on board a ship, is a sufficient delivery to the purchaser, it is not such an acceptance as will bind the contract; for the carrier, if he be an agent merely to receive, is clearly not an agent to accept the goods.²

Mr. Justice Hubbard, in *Snow v. Warner*,³ says:

"We are fully of opinion that the acceptance must be proved by some clear and unequivocal act of the party to be charged."

The statute of frauds, under a fair import of its language, requires this, and the construction it has received gives full force to that language. But it does not follow that, to bind the purchaser, the acceptance must be by him personally, for the statute in terms provides that an agent thereunto

¹ Story on Contr., 821; 2 Kent's Comm., 545; *Stubbs v. Lund*, 7 Mass., 457; *Whitehead v. Anderson*, 9 Mees. & Wels., 534; *Farina v. Home*, 16 id., 119; *Hart v. Bush*, 4 Jur. N. S., Q. B., 271; *Lillywhite v. Devereaux*, 15 Mees. & Wels., 385; *Dilke v. Andrews*, 2 Exch., 29.

² *Caulkins v. Hellman*, 47 N. Y., 449.

³ 10 Met. (Mass.), 132; *Barney v. Brown*, 2 Vt., 374; *Spencer v. Hale*, 30 id., 314; *Gibbs v. Benjamin*, 45 id., 130; *Knight v. Mann*, 118 Mass., 146; *Safford v. McDonough*, 120 id., 290; *Buckley v. Rensselaer Railroad Company*, 71 N. Y., 205.

authorized may bind his principal by a memorandum in writing. Hence the conclusion follows, that if the agent can purchase for his principal, there existing no prohibitory clause, he may accept and receive property, and thus bind his principal. All this is in accordance with the rights and duties of principal and agent generally.

§ 342. It may be observed that, if a contract is in writing, a delivery of the goods sold, at the place designated therein, or a shipment of them in accordance therewith, or as specially directed by the vendee, will pass the title without further acts of acceptance or receipt. Accordingly, where a written order for goods is given, so as to take the case out of the statute of frauds, and the vendee directs them to be sent by a particular carrier, the title vests in the vendee immediately upon their delivery to such carrier, and he is responsible to the vendor, though the goods be lost by the carrier, and never actually come to the vendee's possession.

The inference has been drawn from the decisions, that, where goods are delivered upon a verbal order, the delivery to a common carrier would be such an execution of the agreement on the part of the seller as to preclude him from taking advantage of the statute to reclaim the goods, but that the purchaser might still refuse to execute the verbal agreement; that he might open and examine the goods, and, after examination, return them.¹

§ 343. The case of *Rodgers v. Phillips*² illustrates the doctrine of delivery to a carrier before acceptance. There, the defendants, at New York, gave a verbal order to the plaintiffs for one hundred and eighty-eight tons of coal, and directed them to deliver the same on board a boat at Richmond, Pennsylvania, in the customary manner. No particular boat was designated. The plaintiffs caused the coal to be loaded on board a boat for transportation to New York, and took a bill of lading for the same. Immediately after the coal was laded (June 26, 1858), the boat sprung a

¹ *Kent v. Hutchinson*, 3 Bos. & Pul., 233. ² 40 N. Y., 530.

leak and sunk. Two days afterwards the defendants received a bill of lading, and an invoice, consisting of an unscribed bill of the coal. They returned the bill of lading to the plaintiffs, who sent it back to them saying that they "had nothing to do with it."¹

At the trial the defendants contended that no valid sale was established under the statute, and moved for a nonsuit; this was denied. The court directed a judgment for the plaintiffs, from which judgment and order overruling the exceptions the defendants appealed to the court of appeals. In the appellate court it was held that, up to the time when the coal was lost by the sinking of the boat having it on board, no act was performed by the defendants from which it could be colorably claimed that they had accepted the coal, or become invested with the title to the same.

Daniels, J., in delivering the opinion of the court, gives a lucid exposition of the law. After declaring that the contract was within the statute; that nothing had been paid thereon, and therefore void, he says: "Although the plaintiffs did perform all that would have been requisite to transfer the title to the coal to the purchasers, under the well established rule of the common law, it does not follow that what they did would be attended with the same result under the rule prescribed by the statute of frauds. . . . In cases like the present one, it is the statute, and not the common law, that has provided the mode by which the previously void agreement could be rendered legal and binding upon the parties. And that mode must be pursued; otherwise, the agreement must remain without any binding force upon either of the parties. Until that may be done, the contract must remain entirely optional on the part of each of the parties. *Even if the vendors elected to perform it, and deliver the property precisely as they had agreed to, it was*

¹ A delivery of a bill of lading with the mutual intent to effect a delivery of the goods will pass the title thereto. *City Bank v. Rome*, W. & O. R. R. Co., 44 N. Y., 136; *Cayuga County Nat. Bank v. Daniels*, 47 N. Y., 631.

still optional with the vendees whether they would receive it or not. And even if the former went so far as to actually deliver it, the vendees still had their election to either receive or refuse it. This resulted from the unequivocal terms made use of in the statute." The statute of frauds requires that the vendees, under such a contract as was shown upon the trial of this cause, should not only *receive*, but, in addition to that, *accept* part of the property contracted to be sold to them, in order to render the contract binding. The learned judge enunciated the following sound principle: "Where a valid and subsisting contract for the sale of personal property may be shown to exist, and by its terms the property is to be shipped by the vendor to the vendee, then a delivery of it to a responsible carrier for the vendee, to be carried and delivered to him, will, ordinarily, transfer the title to the vendee and place the property at his risk. *But this rule requires that the contract between the parties shall be at the time legal, valid and subsisting.*"

The above decision seems also to be in accordance with some of the English cases.¹

§ 344. In *Rodgers v. Phillips*² the court distinguishes that case from *Dawes v. Peck*,³ *Waldron v. Romaine*⁴ and *Bushell v. Wheeler*,⁵ where the property contracted to be sold was delivered to a particular carrier designated or selected by the vendee.

The case under review differs from those cases in the circumstance that no such designation was made by the defendants. The carrier was selected by the plaintiffs. The defendants in no manner authorized or participated in it, beyond the authority conferred by the terms of their void contract. Being void, the plaintiffs could not avail themselves of its terms for the purpose of binding or concluding the defendants by what they did under it.⁶ Whatever the

¹ *Dawes v. Peck*, 8 T. R., 330.

² 40 N. Y., 530.

³ 8 Term R., 330.

⁴ 22 N. Y., 368.

⁵ 15 Ad. & Ellis, N. S., 142.

⁶ So the English cases hold: *Hanson v. Armitage*, 7 Eng. C. L., 191; *Acebal v. Levy*, 25 id., 170; 10 Bing., 376; *Meredith v. Meigh*, 75 id., 363 (2 E. & B., 364); *Coats v. Chap-*

plaintiffs did towards the performance of the contract they did for themselves and at their own risk until the defendants elected to change the risk and did change it by the acceptance of the property.

As there was no acceptance by the defendants, the coal continued to be the plaintiffs' property, remaining at their risk, and was their loss when the boat went down.

In an early case, however, the contrary doctrine was declared.¹ But it is now deemed well settled, that, where a contract is void within the meaning of the statute of frauds, a delivery to a common carrier not designated by the vendee for transporting the goods, and in the absence of a special agreement to the contrary, *does not constitute an acceptance by the vendee*. The goods in such a case remain continuously at the risk of the vendor.² But it seems to be otherwise if there is a valid contract.³

§ 345. Thus, in *Maxwell v. Brown*,⁴ the court say: "From the language of this statute it is apparent that when there is no written contract a mere delivery will not be sufficient. There must further be an *acceptance* by the purchaser, else he will not be bound."

In *Lloyd v. Wright*⁵ it is said, in the opinion of the court: "The statute requires that the purchaser shall 'actually receive' the goods. But although goods are forwarded to him by a carrier, by his direction, or delivered abroad, or on board of a ship chartered by him, still there is no actual acceptance to satisfy the act, so long as the buyer continues

lin, 43 id., 831; *Farina v. Home*, 16 Mees. & W., 119; *Hart v. Bush*, 1 Ellis, B. & Ellis, 494; *Hunt v. Hecht*, 20 Eng. L. & Eq., 524; *Holmes v. Haskins*, 28 id., 564.

¹ *Hart v. Satley*, 3 Camp., 528; *Baldey v. Parker*, 2 Barn. & Cres., 37; *Spencer v. Hale*, 30 Vt., 314.

² In *Coombs v. Bristol & Exeter Railway Company*, 3 Hurl. & Norm., 510, this subject is considered at length; *Peters v. Bollastier*, 3 Pick., 495; *Goddard v. Demerit*,

48 Me., 211; *Howard v. Bordan*, 13 Allen, 299; *Phelps v. Cutler*, 4 Gray, 137; *Denmead v. Glass*, 30 Ga., 637; *Ross v. Welch*, 11 Gray, 235; *Currie v. Anderson*, 2 El. & El., 593; *Keiwert v. Meyer*, 62 Ind., 287; *Hooker v. Knob*, 26 Wis., 511; *Edwards v. Grand Trunk Railway Company*, 54 Me., 105.

³ *Bacon v. Eccles*, 43 Wis., 227; *Strong v. Dodds*, 47 Vt., 348.

⁴ 39 Me., 98.

⁵ 25 Ga., 215.

to have the right either to object to the *quantum* or quality of the goods."

The logical conclusion in the case of *Rodgers v. Phillips*¹ is that upon a verbal contract for the sale of goods for more than \$50 in value, a delivery of them, in accordance with such contract, to a general carrier, not designated nor selected by the buyer, does not constitute such a delivery or acceptance, under the statute of frauds, as to pass the title to the goods.

It is well settled that there must be an acceptance by the buyer as well as a delivery by the seller.

§ 346. In *Magruder v. Gage*² the appellants, residents of Annapolis, wrote to the appellees, ice-dealers at Boston, asking them on what terms they would sell them a cargo of ice, and they answered: "For a cargo to be shipped before the 10th of July, we shall charge you \$5 per ton, and will get the freight as low as possible."

Thereupon the appellants directed the appellees to ship a cargo of "one hundred and fifty tons," and to procure the freight as low as possible. Thirteen days thereafter the appellees advised the appellants by letter that they had shipped the ice, and inclosed the bill of lading together with an account for the same, which were received by the appellants. The ice was shipped "in good order and condition" on board the schooner "Rio," for Annapolis, to be delivered in like condition to the appellants or to their assigns, he or they paying the freight. The vessel put into New York by stress of weather, but resumed her voyage and reached Norfolk in a sinking condition. The remnant of the cargo was there sold by the captain, and the surplus arising from the sale (\$222) handed over to the appellants and by them remitted to the appellees, who refused to receive it.

This action was brought to recover the value of the

¹ 40 N. Y., 519. In *Billin v. Henkel*, 13 P., 420; Am. Dig., 4, 97, it seems to be held that a delivery of goods ordered, to a carrier named by the purchaser, is not a receipt and acceptance sufficient to satisfy the statute of frauds of Colorado.

² 33 Md. R., 344.

cargo. Upon substantially the above facts, the plaintiffs recovered a judgment and an appeal was taken. Robinson, J., said: "The question as to what acts are necessary to be performed by a vendor under an executory agreement for the sale of unspecified goods, in order to transfer the title to the vendee and subject him to the risk of the carriage, *depends entirely upon the agreement*, either express or implied, between the parties. If the vendor undertakes to make the delivery himself at a distant place, thus assuming the risk in the carriage, the carrier becomes the agent of the vendor, and the property will not pass until the delivery is actually made. On the other hand, if the goods are delivered to a carrier *specially designated by the purchaser, he becomes the agent of the latter*, and the title to the property, as a general rule, will pass the moment the goods are dispatched.

"Should the contract of purchase be silent as to the person or mode by which the goods are to be sent, a delivery by the vendor to a common carrier, in the usual and ordinary course of business, transfers the property to the vendee."

The judgment of the court below was affirmed.

This is a clear exposition of the law on this subject and is in accordance with the latest authorities. The contract in this case was valid under the statute of frauds.

§ 347. The case of *Bullock v. Stcherge*¹ presents the question whether or not the "delivery" of goods under a verbal contract of sale, to a common carrier, not designated by the vendee, in the usual course of transportation, is sufficient, under the Iowa statute of frauds, to bind the contract.

It will be observed that the statute of Iowa embraces among other contracts "those in relation to the sale of personal property, when no part of the property is *delivered*, and no part of the price paid."

In the statutes of Georgia, Massachusetts and New York, the words "accepted and received" are used, and as ex-

¹ 4 McCrary, 184, District of Iowa; 13 Federal Rep., 345.

pounded by the decisions these words mean that in order to dispense with the necessity of any writing the goods must be both accepted *and* received, and that one or the other is not sufficient.

It is well settled in the states mentioned above and in England, that the mere delivering of the goods is not sufficient under the statute, because the words *delivering* and *received* are "correlative terms," and therefore that the goods must not only be "delivered" or "received," but also *accepted*, in order to comply with the terms of the statute. Hence *delivered* and *accepted* are not, according to the decisions of the above named states, equivalent terms.

Love, D. J., says: "But the decisions in England and the states referred to at the same time hold that a delivery to a common carrier, though not designated by the purchasers, is a good and perfect delivery to the latter; and that the carrier is *quoad hoc* his agent. . . . But these decisions further hold that the common carrier is the agent of the vendee for the purpose of delivery only, and not of acceptance, etc. The common carrier cannot accept for the vendee, because acceptance implies assent that the goods are in accordance with the contract. Acceptance implies a mental act."

It will be also observed that the word "delivery" alone is used in the Iowa statute; nor is there a word in that statute equivalent to "accepted." The learned justice, it would seem, properly assumes that the codifiers were not ignorant of the words "accepted and received," or that they unintentionally omitted those words from the statute, and he says: "We must conclude that the word 'accepted' was omitted intentionally, and that the purpose of the legislators was that delivery alone, without 'acceptance,' should be sufficient to dispense with the necessity of writing." . . . He further says: "Now, delivery to a common carrier is not only an open and visible act, calculated to satisfy the policy of the statute, but is ordinarily susceptible of more satisfactory proof than a delivery direct to the vendee,

since, in many cases, the vendee would be the only witness of delivery to him, while delivery to a carrier would always be proved by many disinterested witnesses." The able decision of the learned justice is richly laden with authorities and cases, and is a clear exposition of the law under the Iowa statute of frauds.

§ 348. A consignor may maintain an action against the carrier to recover for the loss of goods. Although in general, where goods are delivered to a carrier, the consignee is the proper person to bring the action against the carrier for their loss, yet, if the consignor makes a special contract with the latter for the carriage, such a contract supersedes the necessity of showing the ownership in the goods, and the consignor may maintain the action, although the goods were the property of the consignee.

In *Dunlop v. Lambert*¹ the lord chancellor said: "It is no doubt true, as a general rule, that the delivery by the consignor to the carrier is a delivery to the consignee, and that the risk is, after such delivery, the risk of the consignee. This is so, if, without designating the particular carrier, the consignee directs the goods shall be sent by the ordinary conveyance. The delivery to the ordinary carrier is then a delivery to the consignee, and the consignee incurs all the risk of the carriage."²

§ 349. In *Keiwert v. Meyer*,³ Perkins, J., delivering the opinion of the court, says: "The vendor, being chargeable in law with knowledge of the invalidity of such contract or order, who delivers the goods to the carrier upon it, takes the risk of their acceptance by the vendee on arrival."

And quotes with approval from the decision in *Krulder v. Ellison*,⁴ to the effect that where the contract of purchase and sale is not valid or complete by reason of the statute of frauds, the goods being over the value of £10, and the

¹ 6 Clark & Fin., 600.

³ 62 Ind., 592; *Hausman v. Nye*,

² *Blanchard v. Page*, 8 Gray, 281, 62 Ind., 486.

Shaw, C. J., a case analogous to the above.

⁴ 47 N. Y., 36.

title, therefore, still vests in the consignor, though the goods have been delivered to the carrier, no acceptance, and all still vesting [resting?] in parol, the action must be brought by the consignor.¹ But all the judges, in delivering opinions, admitted the rule to be, *that the consignee must have brought the action had the order been in writing, and the sale valid.* The question was whether the property passed to the vendee. If it did, he must sue.

§ 350. The most recent case in Minnesota, upon the question of delivery, is that of *The Simmons Hardware Company v. Mullen*.²

The action was for conversion. The goods had been taken by the sheriff under an attachment against one Whitcher. On the trial it was found as a fact that Whitcher ordered the goods from the plaintiff verbally, and that they were shipped to him at Granite Falls, where they arrived and were stored in the warehouse of the railroad company which transported them; that they were never called for or demanded in any manner by Whitcher; that about that time he sold out and left the state; and the defendant levied upon the goods as the property of Whitcher. Judgment was rendered for the plaintiff and the defendant appealed.

The price of the goods was over \$50; there was no memorandum in writing, nor any part of the purchase money paid.

The court, Gilfillan, C. J., decided that unless there was a delivery by the vendor and an acceptance by the vendee, the agreement for the sale of the goods was void under the statute of frauds. That the authorities are substantially uniform in holding that a delivery by the seller to a carrier selected by him, for the purpose of transportation, is not of itself an acceptance by the vendee so as to take the case out of the operation of the statute.

¹ *Coombs v. Bristol & Ex. R. Co.*, 20 Mich., 410; *Hanson v. Armitage*, 5 Barn. & Ald., 510.

² 33 Minn., 195; *Taylor v. Mueller*, 30 id., 343. See, also, *Grimes v.*

§ 351. In *Rindskopf v. De Ruyter*¹ it appeared that the plaintiffs were in trade at Milwaukee, Wisconsin; they sold certain liquors to the defendant doing business in Grand Rapids, Michigan. This was an action to recover a balance claimed to be due thereon. Three principal objections were interposed by the defendant:

1. That the agreement was entered into in Michigan and therefore void under Compiled Laws, section 2137.

2. That the defendant had the right to examine the goods and return them if not as represented; and that the sale was made in Michigan.

3. That if it was a Wisconsin contract the same was void under the statute of frauds.

The referee found that the defendant gave to the plaintiffs' agent, at Grand Rapids, a verbal order for certain liquors; that the sale was to be on ninety days' credit, and the defendant was at liberty to return the liquors if not as represented; that the agent was to submit the order to the plaintiffs, and if it met their approval the goods were to be sent. The court said: "This finding brings this case clearly within the decisions of this court in *Kling v. Fries*² and *Webber v. Howe*,³ and disposes of the first objection;" and held, that the agreement must be considered as made in the state of Wisconsin and not in Michigan. The second objection was held to be untenable.

As to whether the contract was void under the statute of frauds of Wisconsin, the court said that such a sale is void unless the buyer shall accept and receive part of said goods, or the evidences or some of them.

The goods were shipped by the plaintiffs at Milwaukee to Grand Rapids by boat, at the defendant's risk, he to pay the freight. An acceptance by the vendee was necessary to make the contract binding.

¹ 39 Mich., 1.

² 33 Mich., 275.

³ 36 Mich., 154. See, also, *Roethke* 183.

v. Brewing Co., Sup. Ct. Michigan, January, 1876; 13 Alb. Law Jour.,

The only act of receipt and acceptance in Wisconsin was by the carrier. He received the goods simply for transportation to Michigan. His acts, it was decided, were not of force to work a binding transfer and make out an obligatory sale in Wisconsin against the statute of frauds of that state.

§ 352. In *Silver v. Bowne*¹ a contract was made whereby one Nichols was requested to go to Tivoli and buy a cargo of hay for the defendants; he did so and bought the hay of the plaintiffs. The testimony tended to show that it was understood between the parties that the hay should be sent upon the barge "Erie." The barge was owned by the defendants and Nichols. After the hay was laded upon the barge and receipted for by Nichols it was lost by the sinking of the barge.

A motion to nonsuit on the ground that there was no delivery was denied. The delivery was held sufficient. On appeal it was urged that if there was a delivery there was no acceptance. The court conceded that the point was not free from difficulty, but as it was not presented by any exception in the case, it was not considered.

§ 353. The law is well settled that, where there is a valid and subsisting contract between the parties, a delivery of the goods under it to a responsible common carrier, or to a carrier specially designated by the buyer for transportation, constitutes a receipt and a transfer of title to the buyer.

Some cases have held that a delivery of goods to a carrier designated by the vendee is of the same legal effect as a delivery to the vendee himself.² But contrariwise, where the carrier is selected by the vendor; for the delivery to such a carrier, in no legal sense, constitutes an acceptance by the vendee so as to exclude the case from the operation

¹ 55 N. Y., 659.

Strong v. Dodds, 47 Vt., 348; *Cross*

² *Orcutt v. Nelson*, 1 Gray, 536; *v. O'Donnell*, 44 N. Y., 661.
Merchant v. Chapman, 4 Allen, 362;

of the statute of frauds.¹ These rules seem to be uniformly applied.²

"It is not necessary that the purchaser should employ the carrier personally, or by some other agent than the vendor. We see no reason why a delivery to a warehouseman should not have the same effect."³

So the delivery of goods in pursuance of an order to a common carrier constitutes an actual delivery to the vendee. But it should be borne in mind that the carrier not designated by the vendee simply represents the vendee for the purpose of receiving the goods for transportation, not for accepting the goods. The carrier in such case, in law, is the bailee of the person to whom, not by whom, the goods are sent.

§ 354. In *Grey v. Cary*⁴ there was an acceptance but no receipt of the property.

The defendants selected, and agreed to purchase of the plaintiffs at a price more than \$50, a certain scale of the Fairbanks patent. As no memorandum of the bargain was subscribed by the defendants, the contract was void unless actual receipt could be shown. The scale was selected by the defendants, and in that respect there was an acceptance. It was to be paid for on delivery. The carman who undertook to deliver it was the servant of the plaintiff. Upon reaching the defendants' place of business, he handed them the bill, and was told to drive into the back yard with the scale. In attempting to do so he accidentally caused the scale to be broken.

Van Hoesen, J., at the general term of the court of com-

¹The same point arose, under slightly different circumstances, in *Frostburg Mining Co. v. N. E. Glass Co.*, 9 Cush., 115; *Meredith v. Meigh*, 75 Eng. C. L., 363; *Castle v. Sworder*, 5 Hurl. & Nor., 281. See, also, *Foster v. Rockwell*, 104 Mass., 167, 172; *Cobb v. Arundell*, 26 Wis., 553; *Everett v. Parks*, 62 Barb., 9; *Johnson v. Dodgson*, 2 M. & W., 653; *Cusack v. Robinson*, 1 B. & S., 299, and 30 L. J. Q. B., 261.

²*Johnson v. Cuttle*, 105 Mass., 447; *Grimes v. Van Vechten*, 20 Mich., 410.

³*Hunter v. Wright*, 12 Allen, 548.

⁴9 Daly, 363; *Benjamin on Sales*, 181.

mon pleas, said: "Had the scale been delivered to a common carrier, selected by either the plaintiff or the defendant, we should be bound by the authorities to hold that it was received by the defendants. Though a carrier selected by the seller cannot accept goods, so as to take a contract out of the statute of frauds, it is settled that, where a purchaser himself has accepted the goods, a delivery to any common carrier will be regarded as a receipt of the goods by the purchaser."

Although the authorities are somewhat variant, the above decision is in accordance with the more recent cases and is good law.

§ 355. The case of *Allard v. Greasert*¹ furnishes a good illustration of the principle of acceptance without receipt. There, an agent of the plaintiffs, a firm doing business in Rochester, called with samples of goods on the defendants and stated the prices, and they selected certain goods, which in the aggregate amounted to more than \$50, though composed of many articles of less amount. No memorandum of the contract was subscribed. The goods were agreed to be sold on a credit of "four months," and were to be sent to the defendants by express. After being boxed they were delivered to the M. U. Express Company and thence transported to the defendants at Medina. The defendants refused to receive the goods, principally on the ground that "one dozen harvest hats differed from the sample," the purchase price of which was \$4.50. On this ground of defense the plaintiffs were nonsuited. The question for determination on appeal was, whether the goods were accepted and received by the buyers so as to satisfy the statute of frauds. After citing *Rodgers v. Phillips*,² and *Cross v. O'Donnell*,³ the court decided that there was no reason for holding that the buyer, in such case, intended to clothe the carrier, of whose agents he may know nothing, with authority to ac-

¹ 61 N. Y., 2.

² 40 N. Y., 519.

³ 44 N. Y., 661; Story on Sales,

241; Benj. on Sales, 160; *Baldey v.*

Parker, 2 B. & C., 41.

cept the goods, so as to conclude the buyer as to their quality, and bind him to take them as a compliance with a contract of which such agent was ignorant.

This case furnishes as good an illustration as any. Earl, C., says: "The goods were boxed; the carrier could know nothing about them; and its agents had no right to unpack and handle them. Its sole duty and authority was to receive and transport them. In such a case it would be quite absurd to hold that the carrier had an implied authority from the buyer to accept the goods for him. If the buyer does not accept in person, he must do it through an authorized agent."

The judgment of nonsuit was affirmed.

§ 356. In *O'Neill v. New York Central & Hudson River Railroad Company*,¹ the question of liability of a common carrier was presented.

A number of barrels of cider were delivered by one Hill to the defendant for transportation from Fairport to Rochester. The barrels were not marked and Hill gave no instructions as to them; but the agent of defendant was acquainted with the plaintiff and knew his place of business to be at Rochester.

The action was for damages occasioned by the loss of the goods by fire in the depot.

Grover, J., delivering the opinion of the court of appeals, considered it well settled that a carrier is responsible as such, only when goods are delivered and accepted by him *for immediate transportation* in the usual course of business.

If delivered, awaiting further orders from the shipper before carriage, he is, while they are so in his custody, responsible as warehouseman.²

The learned judge decided that the defendant was not liable as carrier.

¹60 N. Y., 138.

²*Rogers v. Wheeler*, 52 N. Y., 262; *Angell on Carriers*, § 129.

The plaintiff's contract to purchase the cider of Hill was held to be void under the statute of frauds.

§ 357. It is generally held that the acceptance and receipt need not be simultaneous, but may take place at different times; and where the purchaser has himself inspected and accepted the goods purchased, the delivery of them to a common carrier, or by his direction to a designated carrier, is a good delivery to the purchaser.

So, also, it has been held, that where a valid contract of sale is made in writing, a delivery pursuant to such contract at the place agreed upon for delivery, or a shipment of the goods in conformity with the terms of the contract, will pass the title to the vendee without any receipt or acceptance of the goods by him. But if the contract is oral, and no part of the price is paid by the vendee, there must be not only a delivery of the goods by the vendor, but a receipt and acceptance of them by the vendee to pass the title or make him liable for the price; and such acceptance must be voluntary and unconditional.¹ Even the receipt of goods, without an acceptance, is not sufficient. Some act or conduct on the part of the vendee, or his authorized agent, manifesting an intention to accept and appropriate the goods as a performance of the contract, is requisite to supply the place of a written contract. But where goods are received in order to test them, that will not amount to an acceptance.

§ 358. It will be found by an examination of the authorities, that, in most of the cases where a delivery to a carrier has been held to satisfy the statute of frauds, there has been a prior acceptance of the goods by the buyer or by his authorized agent. A buyer may accept and receive through an agent expressly or impliedly appointed for that purpose.

There is every reason for holding that a designated car-

¹ *Caulkins v. Hellman*, 47 N. Y., 100; *ten*, 20 *id.*, 413, 420; *Bacon v. Ecles*, 432. See, also, *Chamberlin v. Dow*, 43 *Wis.*, 227. 10 *Mich.*, 319; *Grimes v. Van Vech-*

rier may receive for the buyer, because he is expressly authorized to receive, and the act of receiving is a mere formal act, requiring the exercise of no discretion. But there is no reason for holding that the buyer, in such case, intended to clothe the carrier, of whose agents he may know nothing, with authority to accept the goods, so as to conclude him as to their quality, and bind him to take them as a compliance with a contract.

CHAPTER XIX.

OF EARNEST AND PART PAYMENT.

- § 359. Early history of earnest.
- 360. Word earnest omitted in the statute of certain states.
- 361. Examples of earnest given.
- 362. Effect of giving earnest or paying part of the price.
- 363. Part payment or earnest must be made at the time of the contract.
- 364. Earnest binds the contract.
- 365. Principle of earnest under the common law and the statute of frauds.
- 366. Words "at the time" are strictly construed.
- 367. Contained in the statute of several states.
- 368. An example of subsequent payment of part of purchase money.
- 369. Extent of part payment immaterial.
- 370. What is payment "at the time;" *Hunter v. Wetsell*.
- 371. The same subject continued.
- 372. Valid contract made by adopting terms of void contract.
- 373. Subsequent part payment satisfies the statute of frauds; early case of *Thompson v. Alger*.
- 374. When part payment deemed as made; when accepted with concurrence of parties.
- 375. What will serve in lieu of money as part payment.
- 376. Terms of the contract must be restated where payment subsequently made.
- 377. Example; *Bissell v. Balcom*.
- 378. Same subject continued; minds of the parties must meet.
- 379. Another example involving peculiar circumstances; *Paine v. Fulton*.
- 380. Where goods were taken on a contract, but not "at the time."
- 381. Deposit not equivalent to part payment.
- 382. Where payment was proved.
- 383. Goods as part payment, if paid at the time, will satisfy the statute; *Dow v. Worthen*.
- 384. An existing debt as part payment.
- 385. Sufficient if evidenced by written memorandum.
- 386. Where mutual debts exist.
- 387. Words not sufficient to satisfy the statute.
- 388. Part performance may be by either party.

- § 389. Agent may receive part payment.
390. Note of the purchaser not a part payment; *Krohn v. Bantz*.
391. Note of a third person may be taken as part payment; *Ireland v. Johnson*.
392. Example where note was given; *Sharp v. Carroll*.
393. Where part payment is made and time extended to pay balance, not a new contract.
394. Novel case of part payment "at the time" of the bargain; *Thornborrow v. Whitacre*.
395. Deductions from the decisions.

§ 359. In the early history of the Northern nations there existed a custom, which was deemed more or less necessary, of the contracting parties shaking hands in signification of the conclusion of the bargain. This was commonly called *handsale*,—*venditio per mutuam manuum complexionem*.

The giving of earnest seems to have followed the *handsale* custom and to have been the outgrowth of it.

Earnest, under the Roman law, consisted mainly of two kinds: one related to agreements made anterior to the contract, whereby a piece of money was given as a consideration for the right to purchase. If the buyer carried out the bargain the earnest money was deducted from the price; if default was made, the earnest money was forfeited. The other species of earnest was similar to that under the common law. It might consist of any article of value, as a jewel or a ring (*anulus*) for example, which the buyer passed over to the seller as a symbol of the consummation of the bargain, *argumentum contractus facti*.¹

Earnest, as may be gleaned from the early authorities, did not form any part of the purchase price. It was given as a token that the bargain had been ratified, and could be proved by parol.

§ 360. Of the custom of giving something in earnest to bind the bargain, Mr. Chancellor Kent says: "It has fallen into very general disuse in modern times, and seems rather

¹ On this subject, see Parsons on Sales, 195, 196; Chase's Black-Contr., vol. 3, pp. 1-60; Home v. stone, 555. Hayward, 108 Mass., 55; Benjamin

to be suited to the manners of simple and unlettered ages, before the introduction of writing, than to the more precise and accurate habits of dealing at the present day.”¹

The word “earnest” has been omitted in the statute of frauds of New York, California, and many other states. If something be given in “part payment” the contract is rendered binding.²

§ 361. Although the custom of giving earnest is antiquated, a reference to some of the cases and authorities on the subject may not be uninteresting.

In the early case of *Blenkinsop v. Clayton*,³ the buyer drew a shilling across the hand of the seller, which was called “striking off the bargain,” but as the coin in that case was not delivered to the seller, the court decided that the statute had not been satisfied.

In another case, a half-penny,⁴ and another,⁵ a shilling was given as earnest, and was declared to be sufficient to satisfy the statute of frauds.

A payment by way of earnest will vest the property in the thing sold. If A. sell a cow to B. and receive part of the price, and the cow die while in the vendor’s possession before delivery to the vendee, or payment of the remainder of the purchase money, still the vendor is entitled to the payment of the price, because the payment of the earnest vests the property in the vendee.⁶ But if the bargain rest only in a promise to pay, it would be void.⁷

§ 362. The statute of frauds of most of the states contains a provision to the effect that, unless the buyer at the time of the contract pay some part of the purchase money, or give something in *earnest* to bind the bargain, it is void. The part payment and earnest are distinct acts independ-

¹ 2 Kent’s Comm., 495.

² *Pierce v. Gibson*, 2 Ind., 408.

³ 7 Taunt., 597; 53 L. J. Ch., 1055; 50 L. T., 573; 32 W. R., 802.

⁴ *Bach v. Owen*, 5 T. Rep., 410 (1793).

⁵ *Goodall v. Skelton*, 2 H. Bl., 316

(1794); *Howe v. Smith*, 29 Ch. D.,

89; *Law Quarterly Review*, vol. 1, p. 17; *Artcher v. Zeh*, 5 Hill (N.

Y.), 200; *Browne on the Stat. of Frauds*, § 341.

⁶ 2 Bl. Com., 443.

⁷ *Shep. Touchstone*, 224.

ent of the bargain, and may be proved by parol evidence.¹

The legal effect of either of these acts, under the rules of evidence, if the minds of the contracting parties have met, is to render the contract obligatory and enforceable by law.²

A mere tender of earnest or part payment is not sufficient.

§ 363. Some well considered cases hold that *earnest*, as used in the statute, is to be regarded as equivalent to *part payment*; yet a technical construction of the terms would seem to imply that earnest means, as originally applied, something to bind the bargain; and part payment, an act done after the bargain is closed.³

According to the decisions in many of the states, the act of giving something in way of earnest or part payment must take place at the time of the contract. And that a part payment made after the making of the contract, upon the mutual and explicit understanding between the parties that it is to apply to the contract previously entered into, will not validate it, but have the effect of making a new contract; and this has been held even in those states where the statute does not in terms require a part payment to be made "at the time" of the contract.⁴

§ 364. While the statute of frauds has given no new efficacy to the payment of earnest, it has excepted out of the requisition it has made for written evidence of the contract, the cases wherein earnest has been paid or a part payment made.

¹ Ely v. Ormsby, 12 Barb., 570.

³ Howe v. Hayward, 108 Mass.,

² Groat v. Gill, 51 N. Y., 431;

54; Dooley v. Erlbert, 47 Mich.,

Joyce v. Adams, 4 Seld., 291; Jen-

615; Bissell v. Balcom, 39 N. Y.,

nings v. Flanagan, 5 Dana, 217;

275.

Edgerton v. Hodge, 41 Vt., 676;

⁴ Jackson v. Tupper, 101 N. Y.,

Hawley v. Keeler, 53 N. Y., 119;

515. But see Hunter v. Wetsell,

Benjamin on Sales, §§ 357, 193;

57 N. Y., 375; Jackson v. Hubbard,

Mattice v. Allen, 3 Keyes, 492; Bra-

36 Conn. 10.

bin v. Hyde, 32 N. Y., 519; Walker

v. Mussey, 16 M. & W., 302.

The statute does not condemn the sale of goods in any case, but requires that if the contract is not evidenced by the requisite note or memorandum in writing, it shall be authenticated by some mutual act of the parties in part performance; as part payment, or acceptance and receipt, of some part of the goods to validate the contract.

§ 365. Of the common law principle of earnest, and the change which the statute of frauds effected, the following example may serve as an illustration:

If, before the statute of frauds, a man offered to sell his horse for \$100, and another offered to buy him at that price and presently tendered the money, the bargain was concluded, and the party proposing to sell was not at liberty to dispose of the horse to a new purchaser. But by the operation of the statute such owner would be perfectly free to sell the horse to a third person, unless the party first offering to purchase could substantiate the bargain by the production of a note or memorandum in writing of the bargain, signed by the seller.¹ Or, it may be added, unless he could show a part payment, or earnest-money given to bind the bargain.

§ 366. In general the cases hold that the words "at the time," relating to part payment, should be strictly construed.² Hence, it follows as a necessary consequence, that a part payment made subsequently to the making of the contract will only make a valid contract as of the time when the part payment is made. And only then where the terms of the former void contract are restated or reaffirmed and mutually agreed upon.

The case of *Jackson v. Tupper*³ is quite in point. It was

¹ Roberts on the Stat. of Frauds, 169; *Alexander v. Comber*, 1 H. Bl., 20.

² *Allis v. Read*, 45 N. Y., 142; *Fluckner v. United States Bank*, 8 Wheat. R., 363; *Kirhof v. Atlas Paper Company*, 32 Northwestern Rep., 766.

³ 101 N. Y., 515; Central Reporter, vol. 2, p. 407, decided March, 1886; 2 R. S., 136, sec. 3; *Hunter v. Wet-sell*, 57 N. Y., 375; 84 id., 549; *Allen v. Aquiria*, 5 N. Y. Leg. Obs., 380; *Clarkson v. Carter*, 3 Cow., 84.

conceded in the case that the oral contract of February, 1880, for the sale and storage of certain ice, was, when made, void under the statute of frauds; and that under the New York decisions it was not validated by the payment made subsequently — in May, 1880. Andrews, J., delivering the opinion of the court, said: "By our statute, payment operates to take an oral contract for the sale of goods for the price of \$50 or more out of the statute, only when made *at the time* of the contract."

§ 367. By the statute of frauds of many of the states there exists no provision, as such, requiring earnest or part payment, or some part of the purchase money, to be made *at the time* of making the contract.

But even in those states it seems to be held that earnest must be given or part payment made at the time the contract is made.¹

In six states,² at least, the words "at the time" occur in the statute relating to the sale of goods, etc.

§ 368. In way of illustration of the decisions under this clause of the statute: If a bargain be made by which A. agrees to sell to B. ten barrels of flour at a given price, no part being delivered, and no memorandum in writing subscribed, and no earnest given or part payment made by B., it is simply in the nature of an offer. If they subsequently meet, the next day or the next month, and restate or reaffirm the former bargain, and B. then pays to A. a part of the price, then, and at *that* time, a contract is concluded, and *then* it is that a contract exists which is valid and binding

¹ Whitwell v. Wyer, 11 Mass., 9; 12 Met., 435. *delivery* and the *payment* should be made *at the time* of the contract.

² California, Minnesota, Nevada, New York, Oregon and Wisconsin. But the legislature modified the provision as reported, and adopted it as it now stands in the statutes.

In the Revised Statutes of New York, of 1830, the words "at the time" first appeared. The requirement as to *time*, so far as related to the *memorandum*

The revisers in their report to the legislature of that state provided that the *memorandum*, the *and delivery*, was omitted, but was retained as to the *part payment*.

under the statute of frauds. The former agreement is not reanimated or revived, but a *new* contract is *then* made, which is enforceable by law.

It is, in substance, held that payment subsequently made, although conforming to the oral agreement, is insufficient of itself to make the prior oral agreement valid. There must be enough in addition to the act of payment, to show that the terms of the prior oral contract were then in the minds of the parties, *and were re-affirmed by them; and this being shown, a cause of action arises, not on the prior oral contract, but on the new contract made at the time of payment.*

The plaintiffs here did not bring their case within this principle. There was no restatement of the terms of the prior oral agreement when the payment of May 1, 1880, was made, and no express recognition thereof; nor was the payment made for the avowed purpose of binding the prior bargain. It was expressly found that when the payment was made nothing was said by either party about the contract of February 28, 1880, *or its terms*. And so it was declared invalid.¹

§ 369. It may be pronounced as well settled under the decisions in England and in this country, that, as used in the statute of frauds, earnest is equivalent to a part payment. In either case it must be money or something of value, although the amount in money or the extent in value is quite immaterial.

§ 370. The case of *Hunter v. Wetsell*² is directly in point.

¹ On kindred subjects, see *Ather-ton v. Newhall*, 123 Mass., 141; *Townsend v. Hargraves*, 118 id., 333; *Cunningham v. Ashbrook*, 20 Mo., 561, 583; *Rickey v. Tenbroeck*, 63 Mo., 563; *Mathiessen & Weichers Reflector Co. v. McMahon's Adm'r*, 38 N. J. L., 536; *Marsh v. Rouse*, 44 N. Y., 643; *Morrill v. Cooper*, 65 Barb., 516; *Fitzsimons v. Woodruff*, 74 N. Y., 621; *Day v. Pool*, 52 N. Y., 416; *Gaylord Manufacturing Co. v. Alen*, 53 N. Y., 519.

² 57 N. Y., 375 (1867). But see same case on second appeal to the court of appeals, 84 N. Y., 549; *Gould v. Town of Oriconta*, 71 id., 307; *Hawley v. Keeler*, 53 id., 114.

The action was brought to recover the price of certain hops, alleged by the plaintiff to have been sold to the defendant for \$300.

The only compliance with the statute of frauds claimed in the case was a part payment. No payment was made at the time of the contract, but about a month afterwards the defendant paid \$200, and a month after that \$100, to the plaintiff. Nothing was said when these payments were made about the hops or the contract, except that the payments were "made towards the hops," nor was anything said at any time about a renewal, or reaffirmation or restatement of the contract.

Earl, C., delivering the opinion of the court, reviews the authorities, and concludes that this cannot be deemed a payment "at the time," within the meaning of the statute of frauds. A payment not made at the time, he observes, can never, under any circumstances, satisfy the requirements of the statute.

"But when a contract for the sale of personal property, valid at common law, is made, and the buyer afterwards *pays expressly to bind the contract, or when payment is made, and the parties then reaffirm or restate the terms of the contract, and their minds then meet so as to make a contract*, the statute is undoubtedly satisfied. Such a payment is made at the time of the contract and not afterwards."

A new contract is then made as of the time of payment.¹

§ 371. On the second appeal in *Hunter v. Wetsell*,² the court referred to the previous appeal where it was declared that the payments were insufficient to validate the contract, because when made there was no restatement or recognition of the essential terms of the contract.

In the case as presented on this appeal, the difficulty, fatal before, was obviated. The proof presented here showed that a restatement of the essential terms of the con-

¹*Jackson v. Tupper*, 101 N. Y., art. 60 N. Y., 413, reversing 1515, *Andrews, J.*; *Organ v. Stew-* Hun, 411.

²84 N. Y., 549.

tract was made at the time of the delivery of the first check for \$200. There was some contradictory proof. The question was left to the jury, and they, in rendering a verdict for the plaintiffs, found the fact of such restatement.

“That finding,” says the court, Finch, J., “is conclusive upon us.”

It was claimed that the check given, in and of itself, was not a payment at the time, and so there was no payment. But the court said: It is quite true that a check, in and of itself, is not payment, but it may become so when accepted as such and in due course actually paid. A check is not money, but it is a thing of value and is money's worth when drawn against an existing deposit which remains until the check is presented.

The aim of the statute of frauds “is to substitute some act for mere words, to compel the verbal contract to be accompanied by some fact not likely to be mistaken, and so avoid the dangers of treacherous memory or downright perjury. The delivery of the check was such an act. Indeed, it would be an entirely reasonable and just construction to say that the delivery of the check and its presentation and payment constituted one continuous transaction, and should be taken as such without reference to the ordinary delay attendant upon turning the check into money. The statute does not mean rigorously, *eo instanti*. It does contemplate that the contract and the payment shall be at the same time, in the sense that they constitute parts of one and the same continuous transaction.”

The court held that there was a payment at the time within the meaning of the statute, and that the contract of sale was valid.

It will be observed that the case, on this appeal, turned upon the fact, which did not appear on the former appeal, that a restatement of the terms of the contract was made at the time of the payment of the check.

§ 372. While it is well settled that a subsequent delivery and acceptance of goods, sold under a contract void by

the statute of frauds, renders the contract valid (for the statute does not require that the part acceptance should be at the time of the making of the oral contract), it is otherwise as to earnest or part payment.

In *Allis v. Read*¹ this subject was directly passed upon by the court of appeals.

Church, C. J., delivering the opinion of the court, said: "I do not hesitate to say that after a contract has been made, the parties may make a valid contract by adopting the terms of the void contract, provided it appears that such terms are understood and assented to and a payment is made and received upon the contract. It is a valid contract from *that* time, and the statute is fully satisfied, as if the contract had been made valid originally by a payment at the time."

The language employed by the legislature is too clear and unambiguous to admit of doubt that the part payment must be made *when the contract is consummated*.

§ 373. The first case of importance in this country where the clause of the statute of frauds relating to part payment received attention was *Thompson v. Alger*.² It grew out of an oral contract for the purchase and sale of certain stock in the Hudson & Berkshire Railroad Company.

The statute of frauds of Massachusetts does not in terms require that earnest or part payment shall be made *at the time* of the contract.

But Dewey, J., decided that a payment made subsequently to the time of the making of the contract, with the concurrence of both of the contracting parties, will answer the requirements of the statute, and the contract will become valid from the time of such payment, if when the payment is made the minds of the parties meet, and an agreement is then consummated.

By the decisions in New York and some other states it is

¹ 45 N. Y., 142. See, also, *Walrath v. Ingles*, 64 Barb., 265.

² 12 Met., 435; *Damon v. Osborn*,

1 Pickering, 480. See, also, *Saunders v. Jackson*, 2 Bos. & Pul.,

238.

held in such cases that it is not the former contract or bargain that is really consummated, but the *new* contract.

§ 374. So, also, in *Whitwell v. Wyer*,¹ the court held that, before payment of a part of the purchase money, neither party would be bound by the terms of the oral contract.

Sewell, C. J., said: "The bill of parcels and the payment on July 1st have so direct a reference to the bargain of June 22d as to take the case out of the statute, as far as to establish a contract which may be enforced, notwithstanding the provisions of the statute of frauds, and the bargain proved may be considered as *then made*. The vendee would be under no obligation to make a payment, and the vendor under no obligation to receive one." But, says the court, "when actually made and accepted with the full *concurrence of both parties, then the contract takes effect*; then a part payment of the purchase money has been made, and *then* the parties have made a valid contract."

If the contract is not in law deemed to be made until the part payment of the purchase money, says Paige, J., in *McKnight v. Dunlop*,² referring to the case of *Thompson v. Alger*,³ and the previous invalid oral agreement is merely referred to to ascertain the terms of the subsequent valid contract, the decision in Massachusetts may be regarded as sound.

§ 375. As to what may be regarded and agreed upon as equivalent to money as payment in the sale of goods was touched upon in *Flanders v. Maynard*.⁴ The case grew out of a sale of a lot of cotton. Bleckley, J., substantially held that, whatever the parties, in closing the contract and making settlement, shall finally treat as equivalent or representative of cash, will serve, *pro hac vice*, in lieu of money, if they really intend to conclude the sale presently and pass title at once. This is good law.

¹ 11 Mass., 6.

³ 12 Met., 435.

² 5 N. Y., 537; *Campbell v. Campbell*, 3 Stock. (N. J.), 268; *Green v. Richards*, 8 C. E. Green, 32.

⁴ 58 Ga., 56.

And it may be observed that the money, or thing of value representing money's worth, must be paid or passed over when the bargain is concluded; not *eo instanti*, but so that they constitute one continuous transaction.

§ 376. In *Bates v. Chesebro*¹ it was decided that to make valid a parol agreement for the sale of goods (exceeding in amount the price mentioned in the statute), where there is no delivery of any part, the buyer must *at the time* the contract is entered into pay some portion of the purchase money.

"This is the plain, explicit language of the statute," said Cole, J., "and it is the duty of the courts to give effect to it as enacted, rather than attempt to evade or nullify its provisions by some nice and refined construction." Hence if a valid contract is made at all, it is made at the time the money is paid and received. Not before. And it is necessary, where part payment is made subsequent to the contract itself, that the terms of the previous void contract be restated. It is essential that the minds of the parties should then meet as to the terms and conditions of a contract, so as to form and make a new one.

"If the minds of the parties met and assented to the terms and conditions of the prior agreement, then the statute would be satisfied, because *a complete contract would be entered into at the time part of the purchase price was paid.*"

The court, however, in this case, granted a new trial, on the ground, that the trial judge did not clearly state the distinction, which under the circumstances it was important should be stated, between the payment and acceptance of the \$47 on account of the prior oral agreement and a payment and acceptance on a contract which was made at the time of such payment.

§ 377. The decision of the court of appeals in *Bissell v. Balcom*² is another good illustration of the rule governing

¹ 36 Wis., 640; 32 id., 594.

² 39 N. Y., 275, reversing S. C., 40 Barb., 98.

part payment at the time of the contract, and what effect on the original contract a subsequent payment has.

This was an action to recover the price of certain cattle alleged to have been sold by the plaintiff to the defendant in August, 1861. The cattle were to be kept by the plaintiff on his farm until December following. The defendant was privileged to take any of them away before that time, but was not to pay the plaintiff for keeping them.

At the time of the bargain the defendant asked the plaintiff if he wanted some money to bind the bargain, and plaintiff said he did not care about it then, as his word was good for the bargain. No writing was made, no money paid, and no delivery of any of the cattle. Next day the plaintiff asked the defendant for some money on the transaction. The defendant then paid him \$3, and directed the plaintiff to put the cattle on the flats, thus changing them from one pasture to another; and afterwards requested the plaintiff to divide the cattle, and put one part of them on the plains, and the other part on the flats of his farm, which was done.

During the following month a heavy flood came, and seven of the fifteen cattle were swept down the river and drowned.

After the plaintiff had given his evidence, the defendant moved for a nonsuit on the grounds that the contract was void by the statute of frauds, as there was no memorandum in writing; no delivery of any part of the property; and no part of the purchase money paid at the time of the contract, and that it was an executory contract for a future delivery, and neither performance nor a tender of performance had been shown. The motion for a nonsuit was denied. A verdict was given for the plaintiff.

§ 378. At general term a new trial was granted. The court, Welles, J., rested his decision principally upon the points: First, that the evidence did not show a delivery or acceptance of the cattle, nor anything done towards a delivery. The case, he thought, could not be distinguished in

principle from *Shindler v. Houston*;¹ and secondly, that no part of the purchase money was paid at the time of the alleged sale.²

The court of appeals, Woodruff, J., delivering the opinion of the court, after stating the facts in the case, substantially decided, aside from the question of delivery, that the sale was a present sale, valid at common law; that the effect of the transactions the day following the first oral treaty for the sale, when the parties made distinct and intelligent reference to the negotiations of the day previous, both recognizing its want of validity, because no part of the price was paid; a declared intent to make the bargain binding; assented to; a request for the payment of the money for that purpose, and a payment in compliance with that request, was controlling. At that time there was an affirmance of the agreement and its conditions, and an acceptance of its performance.

“At that very time the minds of the parties do actually meet in the fact of sale, and then there is a bargain made or adopted, and, at that time, part of the purchase price is paid.” The words and treaty before that time had no legal force.

The money paid in this case on the occasion last referred to was a payment of part of the price at the time of the agreement, within the only reasonable meaning and intent of the statute.

The order granting a new trial was reversed.

§ 379. In *Paine v. Fulton*³ the plaintiff had judgment and the defendant appealed and prevailed. In this case damages were claimed for the breach of an alleged executory contract for the sale of a lot of logs. None of the requirements of the statute of frauds were, at the time of the

¹ 1 N. Y., 261.

² The plaintiffs' counsel referred to *Thompson v. Alger*, 12 Met., 428, as holding that part payment may be made after the time of the contract. It seems to have been sim-

ply *obiter* of the judge in that case, as it was not necessary to the decision in the case.

³ 34 Wis., 85; *Pike v. Vaughn*, 39 id., 506.

contract, complied with. On the night of the day on which the agreement was made, however, the defendant stopped with one Smith, a boarding-house keeper in Oshkosh, over night, but did not pay him. Some time afterwards the plaintiffs paid Smith "nine shillings" for entertaining the defendant that night. The testimony tended to show that it was part of the agreement that the plaintiffs should pay this bill, and that it was paid in pursuance of such agreement. The defendant did not deliver the logs to the plaintiffs but sold them to another party.

Conceding that the plaintiffs paid the money to Smith, in pursuance of the contract, observes the court, Lyon, J., and in part execution thereof, it is indisputable that such payment was not made at the time the contract was entered into, but afterwards. The contract, unless such payment saved it, was void.

As there could be no pretense that the money mentioned as having been paid by the plaintiff to Smith was paid *at the time* the alleged contract was made, the judgment in favor of the plaintiff was set aside and a new trial granted.

§ 380. In *Hanson v. Roter*¹ it appeared that the plaintiff, about Christmas, 1882, talked with the defendant about selling him a quantity of logs. Sometime after that he was in the defendant's store, and got a pair of boots on the strength of hauling the logs in question. At the same time he got some feed, also presumed to have been upon the same understanding.

The court, Cole, C. J., in effect said that if these articles were intended to apply on the contract, they would not have the effect to make the agreement valid, for the reason that it was not at the time of the contract.

§ 381. In *Howe v. Hayward*² certain moneys were deposited with a third person "as a forfeiture, to be paid over to the party who was ready to perform the contract, if the other party neglected to do so."

¹ 64 Wis., 622.

² 108 Mass., 55.

Chapman, C. J., held that such deposit was not equivalent to an earnest to bind the bargain, or part payment, and the sale was not valid under the statute of frauds.

§ 382. In *Baker v. Farmbrough*,¹ where an action was brought to recover damages for the breach of a contract for the sale of hogs, the memorandum which was signed was defective in omitting the name of the defendant; and it was clearly proved on the trial that at the time of the making of the contract \$100 was paid as earnest to bind the bargain or as part payment, it was decided that the payment took the sale out of the operation of the statute of frauds (the seventh section), and rendered a reformation of the contract unnecessary.

§ 383. In *Dow v. Worthen*² it was held that part payment required by the statute of frauds does not mean the actual passing of *money* from the vendee to the vendor. But it must be something of value. It must be agreed by both parties at the time that the value is then actually passed,—that it is a *then* present payment.

It must not rest in agreement—it must be *pay down*. Both parties must so understand it.

All that is required is actual part payment. Parties may prove it as they may.

This was an action in *assumpsit* for not receiving a lot of poultry which the plaintiff purchased for the defendant as his agent. The plaintiff was employed by the defendant to purchase certain poultry of one Hatch. He did so. The bargain was made on Saturday. The poultry was to be moved on the following Tuesday or Wednesday. There was no writing, no part of the poultry delivered, and nothing given as earnest; except that, as the evidence showed, previous to this bargain, Hatch agreed to take ten or twelve barrels of apples of the plaintiff. The plaintiff sent him twenty barrels, with word that he would take back

¹ 43 Ind., 240.

² 37 Vt., 108; *Richardson v. Squires*, 37 id., 640.

what he could not sell. On the Saturday it was agreed between Hatch and the plaintiff that the account of the plaintiff against Hatch for the apples should apply towards the poultry, and that account was \$75, and that this was then agreed on as a part payment of the poultry.

"This was something more than a mere agreement as to an antecedent debt," says the court; "it was a settlement and actual transfer of the title of property already delivered." This is the important element in the case. The court below charged the jury that if they found the facts in relation to the apples, and the agreement applying the \$75 in part payment for the poultry, it was such a part payment as constituted a sufficient compliance with the statute of frauds,—if they found it was understood by the parties, at the time of the trade, as a *then* present payment. They found for the plaintiff.

§ 384. In *Matthiessen & Weichers Reflector Company v. McMahon*,¹ the principal question involved was, as to the validity of a parol contract, where goods were sold in payment of an existing debt due from the seller to the buyer.

The same question was passed upon in *Walker v. Nussey*,² the doctrine of which case has been generally adopted in the text-books.³ Substantially the same doctrine was enunciated in *Artcher v. Zeh*,⁴ earlier in point of time, and has been reaffirmed in other cases.

The principle decided in these cases is, that an agreement to purchase, where it is part of the contract of sale that a debt due from the seller is to be part payment of the price, is *not* a compliance with the statute where no receipt is

¹ 88 N. J. (9 Vroom), 536.

² 16 Mees. & Wels., 302.

³ Benjamin on Sales, 139; Story on Sales, 273*a*; 1 Chitty on Cont., 564; 3 Parsons on Cont., 52.

⁴ 5 Hill, 200, S. C. See, also, *Ely v. Ormsby*, 12 Barb., 570; *Teed v. Teed*, 44 Barb., 96; *Walrath v. Ritchie*, 5 Lansing, 362.

It was held in an early case that if A. agrees to purchase a gun of B. for a stated sum and B. is to take another gun of A. in part payment at a less price, A. having refused to deliver his gun and complete his contract, B. may recover of A. the purchase price of the gun. *Forsyth v. Jervis*, 1 Stark., 437.

given, nor any actual credit made in discharge of the debt.

Depue, J., in the case under review, said that "where no written evidence of the contract is made, and payment is relied on as the compliance of the statute, mere words are not sufficient; some act in part performance or part execution of the contract, such as the surrender or cumulation of the evidence of the debt, or a receipt or discharge of the indebtedness, is necessary to make the contract valid. This, in my judgment, is the correct exposition of the statute, and is in unison with the spirit and reason of the enactment."

Hence, it follows that, until an actual application of the payment is made by receipt, indorsement or otherwise, it is nothing more than a simple agreement to pay in that mode; and, so far as the statute is concerned, it no more aids to prove the contract valid than does the agreement to pay the price in an ordinary sale where actual payment is expected.¹

§ 385. As already shown, mere words will not satisfy the statute of frauds.

So it is well established that a verbal contract to purchase an article and apply a debt due from the seller to the buyer to the purchase money in payment is invalid, unless some memorandum or receipt evidences the fact.

Thus, in *Brabin v. Hyde*,² the purchaser had a debt of about \$200 against the seller, and made a verbal contract to purchase from him a mare and colt for \$175, and apply the purchase money in payment of the debt. The court of appeals held that it was not a payment at the time of making the contract within the statute.

§ 386. So in *Mattice v. Allen*,³ where the defendant's agent, who made the agreement to purchase of the plaintiff,

¹ *Gilman v. Hill*, 36 N. H., 317. *v. Fulton*, 34 Wis., 83; *Brady v. Payment to a third party, in discharge of a debt, is sufficient to satisfy the statute of frauds.* *Paine* *Harrah*, 21 U. C. Q. B., 340.
² 32 N. Y., 519.
³ 3 Abbott's Ct. of App. Dec., 250.

iff his barley, had a debt against him of \$40 and agreed at the time that this debt should apply as payment upon the barley, Grover, J., held the agreement to be void under the statute, as it rested entirely in words.

But it is held that where mutual debts exist, an agreement by the parties to apply the same in satisfaction of each other will operate as satisfaction of both.¹ Especially so where it is shown that it has been actually applied by receipts, or otherwise, to bring it within the exception of the statute.²

§ 387. In *Walrath v. Ingles*³ an agreement was made whereby a quantity of clover seed was to be delivered, at a specified price per bushel, amounting in the aggregate to more than \$50, the defendant agreeing to take a barrel of sugar as part payment. This was decided not to be such a part payment as would take the case out of the statute of frauds. In one case, such an agreement was declared to be in fulfillment of the statute, on the ground that it was, in fact, payment and extinguishment of the debt. But that case was afterwards reversed on the ground that mere words will not satisfy the requirements of the statute; that some act of the parties is required, showing by such act their assent to the contract.

§ 388. As a principle deducible from the decisions, it is clear that the act of part performance may originate with the vendor or vendee; with the vendor, if a delivery of part of the goods, and their acceptance by the vendee; with the vendee, if part payment is relied upon. Mutual assent of the contracting parties in either case is necessary. Part payment implies a receipt and acceptance of the consideration on account of the subject of the sale by the party to whom it is made.

§ 389. It is well settled that payment can be made to the vendor, or to his agent authorized to receive it; and when made to such an agent, it is equivalent to a payment to the

¹ *Davis v. Spencer*, 24 N. Y., 386. ³ 64 Barb., 268.

² *Wylie v. Kelly*, 41 Barb., 598.

principal. This rule applies as well to contracts without the statute of frauds as to contracts within it. Thus, in *Hawley v. Keeler*,¹ Andrews, J., held that the part performance contemplated by the statute of frauds must be with the assent of both parties; that a part payment to the agent of the vendor is as effectual as if paid to the principal himself, but that the agent's authority to receive payment must be shown by acts of the vendor recognizing such agency. So, also, a subsequent ratification of the act of an assumed agent, in receiving the payment, is equivalent to an original authority to receive it.

§ 390. In *Krohn v. Bantz*² the respondent Bantz, in error, claimed to have bought a certain number of hogs of Krohn, at a given price. Krohn refused to deliver the hogs and this action was for damages by reason of such refusal. None of the requirements of the statute were fulfilled. But at the time of the bargain a note for \$100 was given by Bantz to Krohn, as an earnest to bind the contract, as alleged, and the question arose whether this was equivalent to earnest or part payment under the statute of frauds. The court, Worden, J., held that a note cannot be construed as a sufficient note or memorandum in writing of the bargain. It was not even signed by the party sought to be charged in the action.

"The note, we think, cannot be regarded as part payment within the meaning of the statute. It was but the plaintiff's agreement to pay, in the future, a part of the purchase money for the hogs, before the arrival of the time for their delivery.

"It was no more effective for the purpose of taking the contract out of the statute, as part payment, than would have been the plaintiff's parol promise to do the same thing." He further proceeds to say that if the note had been of such a character as to be governed by the law merchant, and therefore to legally operate, *prima facie*, as payment, the question presented might have been differ-

¹ 53 N. Y., 119.

² 68 Ind., 278.

ent. A note such as was given here does not legally operate as payment of the debt, without an express agreement between the parties.¹

This decision is sound and is good law. Earnest must be something of a money value. The note here given had no consideration to support it; its payment could not have been enforced.² It was a valueless thing, and could not in any respect satisfy the statute of frauds.

§ 391. So, also, in *Ireland v. Johnson*,³ it was directly held that the giving of a promissory note of the purchaser of goods for over \$50, to the seller, for the purchase price thereof, is not a payment within the statute of frauds, so as to pass the title to the property to the purchaser.

The distinction is drawn between the giving of one's own note and the note of a third person. In the one case it is the mere promise of the purchaser to pay; while in the other it is the actual transfer of a debt or claim against another person, which, if agreed to be taken as payment, actually extinguishes the debt and discharges the liability of the purchaser.

No new liability is created by the giving of one's own note, and no liability is extinguished or in the least changed, the debt remaining unpaid, and the creditor simply has the *promise of the debtor in writing to pay* the amount agreed upon at the time fixed.

The county judge in that case declared that he was unable to see how, in connection with the statute of frauds, it can have the effect of an actual payment, when it is not regarded as payment of the purchase money in any other case.

But it seems to be sufficient to satisfy the statute, if a price is applied upon a precedent debt by a receipt being

¹ *Maxwell v. Day*, 45 Ind., 509; *Alford v. Baker*, 53 id., 279.

² *Combs v. Bateman*, 10 Barb., 573; *Hooker v. Knab*, 26 Wis., 511; *Scott v. Bush*, 26 Mich., 418.

³ 28 How. Pr. R., 463; 18 Abb. Pr. R., 392; *Vaustenberg v. Hoffman*, 15 Barb., 28; *Waydell v. Luer*, 3 Denio, 416.

given at the time. Under an agreement to have a debt due to the agent of the buyer, from the seller, applied on account, it is held not a payment at the time of making the contract, within the statute of frauds.

§ 392. The recent Wisconsin case of *Sharp v. Carroll*¹ is interesting. The action was brought to recover the value of four hundred bushels of wheat, alleged to have been wrongfully taken from the plaintiff by the defendant. The defendant was the sheriff of St. Croix county. He answered that the wheat sued for belonged to W. C. Sharp, who was a brother of the plaintiff, and that he seized the wheat under a writ of attachment to satisfy the claim of F. & J., attaching creditors.

On the morning of the day the attachment was levied, before the seizure, the plaintiff and W. C. Sharp met in Baldwin, and there a negotiation was entered into by which all the wheat in a certain granary was sold by W. C. Sharp to the plaintiff; that the wheat was in bulk, and it was agreed that there were seven hundred bushels, which was to be at eighty-five cents per bushel; that in payment the plaintiff surrendered to W. C. Sharp a note of \$500, which he held against him, and agreed to pay the balance in cash; saying in the presence of a witness, "I give you possession of the wheat now." After this transaction, during the same forenoon, the sheriff attached the wheat. He levied on the wheat, but did no other act affecting the property. While the sheriff was out seeking for teams and sacks to enable him to remove the wheat, the plaintiff and W. C. Sharp came to the house where the wheat was, and by direction of the plaintiff the door of the house was locked. Later in the day the sheriff came and removed the wheat in controversy.

On the trial the plaintiff had a verdict. The defendant appealed. Lyon, J., said: "If the transactions at Baldwin occurred as testified to by all who were then present, there can be no reasonable doubt that the plaintiff then purchased

¹ 27 Northwestern Rep., 832.

the wheat in bulk of Wesley, and delivered to him the \$500 note in part payment therefor, and that the title to the wheat (as between them) passed then and there to the plaintiff."

"The symbolical delivery to the plaintiff of the key to the granary was the only delivery of the wheat practicable at the time, in view of the bulk and nature of the property. Such delivery is effectual in such cases."

On the question of the note surrendered being part payment the court said: "The surrender must actually be made or the credit given. The purchaser must, at the time of the purchase, part with something of value. In this case the plaintiff did part with something of value in part payment for the wheat, to wit, the note he held against Wesley. Such note was effectually canceled by the delivery thereof to the maker pursuant to the parol contract."

The judgment was affirmed.

§ 393. In *Parker v. Steward*¹ the plaintiff made a contract with the defendant for the purchase of a lot of wool. At the time, he paid the defendant \$50 as earnest money, or part payment. The contract was made November 25, 1858; the wool was to be taken away December 15.

On December 11 it was agreed that the time for payment of the balance of the purchase money and for the delivery of the wool should be extended to February 1 following. No writing of any kind passed between the parties.

On these facts the defendant claimed that this enlargement of time for the performance of the original contract constituted a *new* contract, and that as it was not in writing, and no additional earnest money paid, it was within the statute of frauds and void.

But the court, Kellogg, J., held that "where a contract for the sale of goods is taken out of the statute by the payment of earnest, and is not reduced to writing, it does not contravene the spirit or policy of the statute of frauds to allow its terms to be varied by parol any more than it

¹ 34 Vt., 127.

would to allow the terms of the original contract to be thus proved.”

The decisions in such cases treat the original contract as still remaining, and that no new consideration is requisite for an alteration of its terms in respect to the time of its performance. The consideration for the old agreement is imported into the new agreement which is substituted for it.¹

§ 394. One of the most novel, if not the earliest case, which arose under the English statute of frauds, illustrating the effect of a part payment *at the time* of making the contract, is *Thornborow v. Whitacre*.²

It was tried in 1705.

There, as it appears by the record, Thornborow met farmer Whitacre and said to him: “Let us strike a bargain: If I pay you a £5 note down *now*, will you give me *two* rye corns next Monday, *four* on Monday week, *eight* on Monday fortnight, and so on, doubling it every Monday for a year?”

Farmer Whitacre not stopping to estimate the result of such a bargain, and thinking the money easily earned, with avidity accepted the offer, and the bargain was made.

But when the too hasty Whitacre came to calculate how much rye he should have to deliver, he found that *it came to more than was grown in a year in all England*.

In default of the compliance with the contract, Thornborow brought his action.

The court decided that although “the contract was a foolish one it would hold in law.” There was a consideration paid down, and as for the other points urged by the defendant, that it was “an impossible contract,” the court declared that “it was only impossible in respect of the defendant’s ability to perform it.”

The contract was taken out of the operation of the statute by payment of part of the purchase money at the time of the agreement. The plaintiff had judgment.

¹ *Stead v. Dawber*, 10 Ad. & E., 57; 37 E. C. L., 40. ² 2 Lord Raymond’s R., 1164.

§ 395. From the several authorities cited and commented upon in this chapter, the following legal conclusions may be inferred:

First: That the part payment, within the meaning and reasonable construction of the statute of frauds, must be made at the time of the making of the contract.

Second: That if part payment is not made at the time of the making of the contract, and the parties subsequently thereto meet and the agreement is then restated and reaffirmed, mutually between them, and the buyer then pays something to the seller in part payment, the payment then made is a payment made in validation of that agreement, but does not revive or reanimate the former void contract.

Third: That part payment or earnest must be in money or money's worth, that is, something of intrinsic value.

Fourth: That where the vendee gives his own note to the seller, at the time of the contract, it is neither earnest nor part payment, and does not take the contract out of the statute of frauds.

Fifth: A note of a third party may be received as earnest or part payment.

Sixth: A surrender of a note held by the purchaser, to the seller, if done at the time of the contract, will be a payment under the statute of frauds.

As the cases, where these several questions have been passed upon, vary as to the facts and the law as applied, it has been thought of sufficient importance to give the decisions of the courts more or less *in extenso*; and it is believed that all of the cases of any considerable importance have been cited.

CHAPTER XX.

OF THE MEMORANDUM OR NOTE IN WRITING.

- § 396. What is a note or memorandum.
- 397. Statute of frauds of the several states as to memorandum.
- 398. Origin of the provision; effect of it criticised.
- 399. The statute required a new rule of evidence; the contract not void.
- 400. Words "shall not be allowed to be good" construed by different authorities.
- 401. Reference to the fourth and seventeenth sections of the English statute of frauds.
- 402. Certain contracts not illegal, but only incapable of being enforced.
- 403. Requisites of the note or memorandum; *Williams v. Robinson*; contracts not void.
- 404. When may the memorandum be made.
- 405. Essentials of a note or memorandum.
- 406. The memorandum must show who the contracting parties are.
- 407. Where place of delivery stipulated for must appear in memorandum.
- 408. Where contract stated in memorandum is not the contract made.
- 409. Memorandum to be signed before action brought.
- 410. Memorandum must name or designate the parties.
- 411. Presumption as to contents of memorandum.
- 412. Parol evidence to connect writings.
- 413. Where no time is fixed for delivery, law will fix a reasonable time; *Kriete v. Meyer*.
- 414. Same subject; *Lash v. Parlin*.
- 415. Parol evidence allowed to identify the subject-matter of the contract.
- 416. Another example.
- 417. Incomplete contract; where quantity or weight unascertained.
- 418. Another example; *Higgins v. Chessman*.
- 419. The aim of the statute of frauds is to fix the line between negotiation and contract.
- 420. Parol evidence admissible to show the situation of the parties.

- § 421. Statute cannot be set up by the party who signed the memorandum contract.
422. The statute under certain circumstances declared "really a statute of frauds."
423. Contract binding upon one who signs; who may object to its validity.
- 423a. The same subject continued.
424. Not essential that both parties to the contract have a memorandum.
425. In different letters or documents comprising the memorandum there must be no material variance.
426. Mutual relation of the writings must appear on their face; *Beckwith v. Talbot*.
427. Example of sufficient subscription to the memorandum; *Coon v. Rigden*.
428. Where the writings embody the terms, and which are adopted by the defendant.
429. Case where letters made up the memorandum; *Doughty v. Manhattan Brass Company*.
430. Where letters sufficiently refer to the memorandum; an example.
431. A memorandum in a few words.
432. Letters forming a memorandum.
433. Parol evidence not admissible to connect letters in order to satisfy the statute.
434. An acceptance modifying the proposition of the other party is not binding on either.
435. Parol evidence admissible to show that the contract was made by an agent; principal liable, when.
436. Agent liable without disclosing name of his principal; *Fenly v. Stewart*.
437. Whether an order is a memorandum under the statute, or a mere offer; *Wemple v. Knopf*.
438. Example of a memorandum adjudged to be an order.
439. Where mutuality is lacking, simply an offer.
440. Memorandum, where delivered conditionally and not absolutely as a valid contract; the case of *Justice v. Lang*.
441. The same case continued; the second appeal.
442. The same case; the third appeal.
443. Example of defective memorandum; *May v. Ward*.
444. A general order for goods is not necessarily such a contract, although goods be sent under it, as to obligate the seller to fill subsequent orders; *Ashcroft v. Butterworth*.
445. Rule of construction where the order is given to a manufacturer.

- § 446. Distinction between a memorandum under the statute and a written contract.
447. An early case on sufficiency of the memorandum.
448. Sufficiency of the memorandum.
449. Memorandum order containing the words "terms moderate," held conformable to the statute, as the price could be readily ascertained.
450. Courts of chancery hold memorandum sufficient when only one party has signed it.
451. After a memorandum has been signed, can a new verbal contract be substituted for the original one.

§ 396. The meaning of the word memorandum, lexicographically speaking, is a note to help the memory; a minute or record of the existence of certain facts by which something is definitively known.

As used in the statute of frauds, a "note or memorandum in writing" is the evidence of what passed in the minds of the contracting parties at the time the contract was made.

Before the enactment of the statute of frauds, contracts were commonly entered into without any writing. But as this custom gave rise to many fraudulent practices, which were endeavored to be upheld by false swearing and corruption of witnesses, the legislature deemed it expedient to require certain legal evidences of the making of the contract. In other words, that certain specified acts should be shown to have been done by the party to be charged,—such as the signing of some note or memorandum in writing of the bargain.

§ 397. The language of the statute of frauds, in regard to the note or memorandum of the bargain, is somewhat different in the several states.

The meaning, however, is to the same general purport:

(a) A note or memorandum of such contract must be made in writing.¹

(b) Some note or memorandum in writing of the bargain.²

¹ Arizona, California, Nevada, New Jersey, New York, Minnesota, Montana and Wyoming.

² Florida, Indiana, Massachusetts, Maryland, Michigan, Missouri, South Carolina and Vermont.

(c) Some memorandum in writing of such agreement.¹

(d) The promise must be in writing.²

(e) Contract void unless it be in writing,³ as to sales of "personal property."

These differences of language in the several statutes have occasioned some variation in the decisions. Not so much, perhaps, from their diversity, as from the subjects of the contract to which the memorandum is made to apply.

§ 398. The provision of the statute of frauds, as to the necessity of a note or memorandum in writing, had its origin in the assumption that it would be a safeguard against perjury and the subornation of perjury.

Although traditional and juridical history demonstrate that written evidence is freer from the possibilities of tergiversation and fraud than parol testimony, the efficacy of the provision to accomplish this result has sometimes been doubted.

In fact a judge, distinguished alike for his long experience on the bench, and as a common-law lawyer, has said that, as a general regulation, its effects in the courts is not to augment or promote commercial morality, but that it is invariably resorted to for the purpose of defeating an agreement fairly entered into.⁴

On the other hand, experienced jurists and text-writers have been generous in their praise of the beneficent effects

¹Connecticut and Oregon.

²Georgia.

³Iowa and Nebraska. By the statute of frauds of Iowa (Rev., § 4007) the evidence of a contract "in relation to the sale of personal property when no part of the property is delivered and no part of the price is paid," must, as a rule, be in writing to be competent; but the next section (4008) declares that this provision "does not apply when the article of personal property sold is not at the time of the con-

tract owned by the vendor and ready for delivery, but labor, skill or money are necessarily to be expended in producing or procuring the same."

The statute does not declare the contract to be void; it relates only to the evidence by which the contract may be proved. See *Brown v. Allen*, 35 Iowa, 309; *Partridge v. Wilsey*, 8 id., 459.

⁴Daly, C. J., in *Passaic Manufacturing Company v. Hoffman*, 3 Daly, C. C. P. R., 520.

of this provision, as well as of the wisdom which inspired the general policy of the statute of frauds.

§ 399. In *Bailey v. Sweeting*¹ Mr. Justice Williams observes that the effect of the statute of frauds is that, "although there is a contract which is a good and valid contract, no action can be maintained upon it if made by word of mouth only, unless something else has happened; *e. g.*, unless there be a note or memorandum in writing of the bargain, signed by the party to be charged. As soon as such a memorandum comes into existence the contract becomes an actionable contract."

The statute simply introduced *a new rule of evidence*; and an agreement legal and actionable before its passage is legal and actionable afterward.²

In the recent case of *Maddison v. Alderson*³ Lord Blackburn says: "I think it now finally settled that the true construction of the statute of frauds, both the fourth and the seventeenth sections, is not to render the contracts within them void, still less illegal, but it is to render the kind of evidence required indispensable when it is sought to enforce the contract."

Therefore, on general principles, if *the statute of frauds is not pleaded in bar of the action the contract may be sustained*.

The statute only affects the mode of proof as to all contracts falling within it.

§ 400. But, in his excellent work on Contracts, Mr. Pollock also, arguing from an English standpoint, says: "The effect of the seventeenth section is generally understood to be different [*i. e.*, from the fourth section]. It does not only prevent contracts for the sale of goods of the value of £10 or upwards from being sued upon under the conditions specified, but enacts that they shall *not 'be allowed to be good*;' and although it has never been actually so decided,

¹ 9 C. B. N. S., § 843; *Bill v. Bament*, 9 M. & W., 36; *Tisdale v. Harris*, 20 Pick., 9; but see *Gibson v. Holland*, L. R., 1 C. P., 1.

² *Rogers v. Stevenson*, 16 Minn., 68.

³ 8 App. Cas., 467, 488; 52 L. J. (Q. B.), 737, 749.

it is the *accepted opinion* in this country, that where the conditions (of that section) are not satisfied, *the agreement is absolutely void.*"¹

Professor Holland, of Oxford University, in his comprehensive work on "Jurisprudence," takes the same view;² as does also Professor Parsons, in his work on "Contracts."³ And Professor Dwight, in *Marie v. Garrison*,⁴ says the words "shall not be allowed to be good" mean that an unwritten contract within the statute *is absolutely void*. On this point, also see the opinion in *Greene v. Lewis*.⁵

But the reasoning of Lord Blackburn (see § 399) would seem to be more in accordance with the policy of the law.

§ 401. In Wald's *Pollock on Contracts*,⁶ this fact is referred to, that Mr. Benjamin⁷ exhibits the curious difference in the judicial interpretation of the "agreement" of which a memorandum or note is required by section 4, and the "bargain" of which a note or memorandum is required by section 17. The "agreement" of section 4 includes the consideration of the contract, so that a writing which omits to mention the consideration does not satisfy the words of that section; but the "bargain" of section 17 does not.

§ 402. It has been held by well considered cases that contracts within the statute of frauds are not illegal if not in writing, but are only *incapable of being enforced* against the defendant without writing; an immunity which the defendant may waive. Hence, in an action where parol evidence of such a contract was given by the plaintiff without objection by the defendant at the time it was offered, and not until the testimony was closed and the argument to the jury had commenced, it was held that the defendant had waived his right to object to the testimony.⁸ Thus, also, it

¹ Page 574, 2d Eng. ed.

² Page 207.

³ Vol. III, 5th ed., pp. 56, 57.

⁴ 13 Abbott's N. C., 254.

⁵ 26 Upper Canada, Q. B., 618.

⁶ Page 161.

⁷ Page 193, 4th Am. ed. by Bennett, pp. 235, 242.

⁸ *Montgomery v. Edwards*, 46 Vt., 151.

has been held that it does not follow, because a sale is void under the statute of frauds, that the purchaser can derive no title under it. It is only *void at the option of the parties concerned*. If they elect to treat it as valid, it may become effectual for all purposes.¹

The first statute of frauds of New York, like the English statute, contained the words "allowed to be good, except," etc., which were construed to mean, for the purpose of a recovery under it, at the time it is set up and sought to be enforced. In many of the states the statute of frauds reads, "shall be void, unless," etc., a note or memorandum in writing be signed or subscribed by the party to be charged.² Void things are declared to be no things. The statute of some states use the words "No contract," etc., "shall be valid," etc.

§ 403. In the recent case of *Williams v. Robinson*,³ the following memorandum in writing was introduced in evidence:

"AUGUSTA, June 8, 1880.

"I hereby agree to furnish M. F. Williams, of New Haven (postoffice address West Haven), eight hundred to one thousand tons of ice, delivered on board vessels at Augusta, Maine, properly packed for a voyage to New Haven, for the sum of \$2 per ton.

"BOND BROOK ICE COMPANY,

"I. E. ROBINSON, Augusta, Maine."

The court below instructed the jury, substantially, that a memorandum, to be sufficient and valid within the meaning of the statute of frauds, should contain all of the essential elements and terms of the contract entered into by the parties; that parol evidence may be received to show that there

¹ *Russell v. Myers*, 32 Mich., 522; *Putney v. Day*, 6 N. H., 430; *Ormsby v. Lewis*, 46 Ind., 488; 29 Alb. Law Jour., 258; *Browne* on Stat. of Fr., 489. zona, Minnesota, Montana, New Jersey, New York, Nevada, Oregon, Wisconsin and Wyoming contain those words.

³ 73 Me., 186.

² The statute of frauds of Ari-

was some other element in the contract, some other proposition or condition insisted upon by the parties, by the one side or the other, as essential, which was not incorporated in the memorandum; and that in such a case the memorandum would not be valid and sufficient within the statute, and the party could not be charged thereby.

On the appeal, Virgin, J., after stating the common law principle governing contracts, and the change wrought by the statute of frauds, said: "The statute did not declare such contracts illegal, or void, but simply said they should not be actionable, with certain exceptions, unless evidenced by written evidence." The memorandum is the evidence by which the contract is to be proved;¹ it is a condition precedent to the right to sue.

The signature of the parties to be charged is sufficient.²

While contracts must be founded upon a legal consideration, it was not necessary, even at common law, that it be expressed.³

In Maine it was never considered requisite under the statute of frauds, even, that the consideration be recited in the note or memorandum.⁴

The distinction between sections 4 and 17 of the English statute of frauds, set up in the English courts, and followed by some of the courts of the states, has never been recognized in that state. The case of *Packard v. Richardson*⁵ seems to have settled that question.

"The courts," said Willis, J., in *Gibson v. Holland*,⁶ "have considered the intention of the legislature to be of a mixed character; to prevent persons from having actions

¹ *Lawrence v. Chase*, 54 Me., 196. See the able opinion in *Bird v. Munroe*, 66 Me., 337, 343; *Middlesex Co. v. Osgood*, 4 Gray, 447.

² *Barstow v. Gray*, 3 Me., 409; *Getchell v. Jewett*, 4 Me., 350; or by both. *Atwood v. Cobb*, 16 Pick., 227.

³ *Cummings v. Dennett*, 26 Me.,

397; *Bean v. Burbank*, 16 Me., 458.

⁴ *Levy v. Merrill*, 4 Me., 180, 189; *King v. Upton*, 4 id., 387; *Gilligan v. Boardman*, 29 id., 81.

⁵ 17 Mass., 122.

⁶ L. R. 1. C. P. 1.; *Bradford v. Spyker*, 32 Ala., 134; *Philbrook v. Belknap*, 6 Vt., 383.

brought against them so long as no written evidence was existing when the action was instituted."

And as was said in *Williams v. Morris*,¹ the memorandum must be complete, leaving no *jus deliberandi* or *locus penitentie*; it must show a conclusion.

§ 404. It should be steadily borne in mind that the *contract*, and the *memorandum* which is *requisite to its validity*, are in their nature distinct, the one from the other.² They need not be made simultaneously. The memorandum may be made long after the bargain, but before an action is brought, and may be comprised of letters and documents. Hence it will be observed that the evident intention of the legislature was, to prevent parol contracts from being enforced in a court of law, unless the existence of certain requirements are shown.

§ 405. Although the language of the statute of frauds differs in the several states, as already shown, it is settled that the memorandum, to possess any binding force, must contain all the essentials of the contract. It must be in intelligible terms; it must express the price;³ the quantity of the goods; the identity of the persons; and the intention of the parties to the contract. These must appear with such explicitness as to be understood without recourse to parol proof. Mr. Justice Cooley, delivering the opinion of the court in a recent case, said that the memorandum must be complete in itself, and leave *nothing* to rest in parol.⁴ To

¹ 95 U. S. C., 456.

² *Ile v. Stanton*, 15 Vt., 690; Webster v. Zielly, 52 Barb., 482; Davis v. Moore, 13 Maine, 424; Hunter v. Giddings, 97 Mass., 41; Marsh v. Hyde, 3 Gray, 333; North v. Mendel, 71 Georgia R.; Steel v. Fife, 48 Iowa, 99; Neelson v. Sanborne, 2 N. H. R., 381, 414. In *Weightman v. Caldwell*, 4 Wheat., 89, may be found an elaborate note on the subject of note or memorandum in general, which

will well repay an examination and perusal.

³ *Ide v. Stanton*, 15 Vt., 685.

⁴ *Kelly v. Kelly*, The Reporter, vol. 17, p. 179; *Hall v. Soule*, 11 Mich., 494; *James v. Muir*, 33 id., 223; *Sovereign v. Ortman*, 47 id., 181; *McElroy v. Buck*, 35 id., 434; *Gurney v. Collins*, 7 Western R., 670; *Jenness v. Mount Hope Iron Co.*, 53 Maine, 20; *Beckwith v. Talbot*, 95 U. S. R., 289; *Nichols v. Johnson*, 10 Conn., 192, 198; *Bellus*

this general rule, however, there will be found some exceptions. Parol evidence may be admitted to show the identity of a party in certain cases. Thus, where A., as agent for B., enters into a contract with C., but in his individual name, C. may show that B. is the real party in interest, although A.'s name only appears. But A. cannot prove that he is not the real party to the agreement.¹ There is, however, some conflict of opinion on this point.²

§ 406. The memorandum must show the name of the party in whose favor he is charged.

In *McElroy v. Seery*,³ one Hall, trading as "T. Francis Hall & Co.," ordered, through one Richards, a salesman of the appellee, a bill of merchandise on sixty days' credit, to be delivered at Baltimore. Richards made the following memorandum: "T. F. Hall & Co., 88 South Charles street, Baltimore, Maryland." Then followed items of the goods.

The court, Robinson, J., after referring to the object of this particular clause of the statute of frauds (which in that state is the same as the seventeenth section of the English statute), held that the memorandum was not sufficient, principally on the ground that it did not show who were the contracting parties.

§ 407. The authorities agree that the contract must be stated with reasonable certainty, so that its substance will appear from the writing itself. But the memorandum need not stipulate for any time or place of delivery, as the law will supply terms and fix a reasonable time.

But if the time and place of delivery are stipulated for, it goes to the essence of the contract and must appear in the written memorandum.

v. Keyser, 17 Fla., 100; *Benjamin*
on Sales, §§ 221, 231.

¹*Brown v. Sanborn*, 21 Minn.,
402; *Cummings v. Arnold*, 3 Met.,
486.

²*Lerned v. Johns*, 9 Allen, 419;
Violett v. Powell, 10 B. Monroe,
347; *Newcomb v. Clark*, 1 Denio,

226; *Brooks v. Minturn*, 1 Cal.,
481; *Hubbert v. Borden*, 6 Wheat.,
79; *Huntington v. Knox*, 7 Cush.,
371; *Higgins v. Senior*, 8 M. & W.,
834.

³61 Maryland R., 389; 48 Am.
R., 110.

The cases in general hold that the consideration upon which the promise is founded in contracts for the sale of goods need not be formally expressed.

§ 408. *Smith v. Shell*¹ was an action for damages for the breach of a contract for the sale and delivery of one thousand barrels of corn alleged to have been purchased by the plaintiffs of the defendant. The evidence was conflicting as to what the contract really was. Judgment was rendered for the plaintiff, which, on appeal, was reversed. The court, Henry, J., substantially held that, while it might defeat the law to allow a party who has signed a contract to prove by parol that there were other stipulations, if the party seeking to enforce it voluntarily comes into court and testifies that the contract stated in the memorandum is not, in fact, the contract made, it would contravene no public policy to refuse him redress for a breach of the contract, either that actually made or the one evidenced by the written memorandum. The court in this case decided that as the contract actually made was not contained in the memorandum, it could not be enforced.

In *Ellis v. Bray*,² however, it seems to be held that where the memorandum does not purport to be a complete expression of the entire contract, or a part only if it is reduced to writing, the matter omitted may be supplied by parol evidence.

§ 409. The memorandum must be signed before action is brought and be in accordance with the statute of the state where the contract is made. These are inflexible rules, whether the memorandum be composed of documents and letters or simply expressed in one sheet of paper.³

The decisions quite uniformly hold that it is not necessary that the original agreement shall be in writing, but the writings of the person sought to be charged, made after the making of the contract, at any time before the action is

¹ 82 Mo., 217; *Lyle v. Shinnebarger*, 17 Mo. App., 67.

² 79 Mo., 227.

³ *Heideman v. Wolfstein*, 12 Mo. App., 368.

commenced, is sufficient if the terms of the bargain are clearly expressed and relate to the particular subject of the contract.¹

What the statute requires is, not that the contract itself shall be in writing, but *the evidence of it must be*.

§ 410. The memorandum is not sufficient to sustain an action upon, unless the parties to the contract are either named in terms, or are so designated in some paper signed by them as to be identified without resorting to parol proof.² The cases on this question are numerous and somewhat variant. It is well settled, however, that the memorandum satisfies the statute if it be *signed by the party to be charged*, where the other party is designated.³

§ 411. In general, in accordance with the rules of evidence, the presumption always arises that the memorandum contains everything intended by the parties.

Therefore, whatever may have been said at the time the bargain was made, not incorporated in the memorandum, will be disregarded. It cannot be used as evidence.

To this proposition there are some exceptions.⁴

¹ Whaley v. Hinchman, 22 Mo. App., 483; Thompson v. Menck, 4 Abb. App. Dec., 400; Williams v. Bacon, 2 Gray, 387; Webster v. Zielly, 52 Barb., 482.

² Williamson v. Robinson, 73 Me., 186; 42 Am. R., 352; Getchell v. Jewett, 4 Me., 350, 497; Atwood v. Cobb, 16 Pick., 227; Grafton v. Cummins, Sup. Ct. U. S., Washington Law R. (Sept., 1879), p. 407.

³ Smith v. Jones, 66 Ga., 338; Allen v. Bennett, 3 Taunt., 169; Champion v. Plummer, 4 Bos. & Pul., 452; Morin v. Martz, 13 Minn., 191; Wemple v. Knopf, 15 id., 440; Justice v. Lang, 42 N. Y., 494; McMullen v. Terrell, 23 Ind., 163; Newby v. Rogers, 40 id., 9; Dressell v. Jordan, 104 Mass., 407; Slater v.

Smith, 117 Mass., 96; Gartrell v. Stafford, 12 Neb., 546.

⁴ Gardner v. Hazelton, 121 Mass., 494; Riley v. Farnsworth, 116 id., 223; Bacon v. Eccles, 43 Wis. R., 227; Gwathney v. Cason, 74 N. C., 5; O'Neil v. Crain, 67 Mo., 250; McElroy v. Buck, 35 Mich., 434; Morris v. Blair, 39 Ind., 90; Boardman v. Spooner, 13 Allen, 353; Henderson v. Cotter, 15 U. C. Q. B., 545; Burges v. Wickham, 3 B. & S., 669; Blackburn, J. But see opinion of Williams, J., in Chapman v. Langdon, 34 L. J. Q. B., 46; Fawkes v. Lamb, 31 id., 98. The statute of frauds leaves all this law quite as it was before. Benjamin on Sales, 205.

§ 412. It has been laid down as a reasonable rule under the statute of frauds, that if there is an agreement to do something not expressed on the face of the memorandum, and that something to be done is included in another piece of writing, parol evidence may be admitted to show what that particular writing contains, so that together they may constitute a binding contract.¹

Illustration: If A. agrees to build an omnibus for B., and the description of it is put in writing, and the price is agreed upon by parol, or *vice versa*; or, if the parties say, in substance: "We agree to what is contained in such a writing, with such additions and exceptions as we now agree upon by word of mouth," the contract would be upheld, for under such circumstances parol testimony would be admissible to show what the additions or exceptions were, and the memorandum would be conclusive as to the rest.²

§ 413. Thus, in *Kriete v. Myer*,³ no time was mentioned in the memorandum, nor was there any time fixed upon in the parol agreement for the delivery of the goods.

It appeared that Waidner & Co., as agents of Kriete, the appellant, sold to Myer & Co., the appellees, a quantity of canned fruit.

The memorandum was as follows:

"BALTIMORE, May 12, 1882.

"Sold to Messrs. T. J. Myer & Co., for account of E. W. Kriete, (1,000) one thousand cans 3 lbs. standard peaches, half yellow, next season's packing, at \$1.80 per doz., 60 days or less, 1½ per cent. off for cash from date of delivery, said peaches to be fully equal to his last season's packing.

(Signed) "H. A. WAIDNER & Co."

Kriete refused to deliver the goods.

¹ *Ridgway v. Wharton*, 6 H. L. Cas., 257. See *Rhodes v. Castner*, 12 Allen (Mass.), 130; *Lee v. Mahoney*, 9 Iowa, 344.

² *McBride v. Silverthorn*, 11 U. C. Q. B., 545; *Caldwell v. Green*, 8 id., 327.

³ 61 Maryland R., 558. See, also, *Parker v. Wallis*, 60 Maryland R., 15; *Young v. Mertens*, 27 id., 114; *Salmon Falls Manufacturing Company v. Goddard*, 14 How. (U. S.), R., 446.

His defense was, that the memorandum of the date differed from the parol contract; that the parol contract fixed a special date, on or before which the goods were to be delivered; and that, as the memorandum did not contain such "special date," no recovery could be had.

But Stone, J., held that the law in such case will imply that the seller was to deliver the goods within "a reasonable time." What is a reasonable time, *ex necessitate rei*, will depend upon the surrounding circumstances and the character of the goods dealt in. If there be an established custom regulating the delivery of the particular goods which are the subject of the action, such custom will control.

§ 414. As already in effect shown, parol testimony may be admitted to supply certain omissions, where the memorandum does not purport to be a complete expression of the contract, if the evidence offered to explain it is not contradictory of the writing.¹

Thus, a memorandum which omits to state the *time* of the delivery of the goods contemplated by the contract is not void on that account. For in such case the law will supply the omission by implying that the goods were to be delivered within a reasonable time.

So if the contract be incomplete and yet sufficiently definite and certain on its face, parol evidence is admissible to explain and apply it to the contract actually existing. It was so held in an important case recently decided in the court of last resort in Missouri.

In *Lash v. Parlin*² the following memorandum was the basis of the action:

"MESSRS. PARLIN & ORENDORFF:

"*Gentlemen* — Please execute the following order for plows, cultivators, . . . etc., to be delivered on board cars in Chillicothe, Mo., marked for J. F. Lash, No. 6, fourteen-inch cut, medium, steel landside old ground plows

¹*O'Neil v. Crain*, 67 Missouri, id., 227. See, also, *Christie v. Burnett*, 10 Ontario R., 617.

²78 Mo., 397.

iron beam, \$22; No. 7 (extra), sixteen-inch cut, medium steel landside, three-horse, old-ground plows, iron beam, \$22, and other items of plows in detail. Cultivators — iron beam, Parlin's patent, with shields, \$14.50; wood beam, Parlin's patent, with shields, \$13.50. For which I agree to give you my notes, payable with exchange, or by express, prepaid, at above list, for plows, less forty-five per cent., and payable all January 1, 1879, with ten per cent. interest, cultivators less net per cent. and payable January 1, 1879, with ten per cent. interest.

“PARLIN & ORENDORFF, per TAYLOR.”

The court held that, although this memorandum did not constitute a complete contract, it was sufficient as between the parties to be admissible in evidence. That parol evidence might be introduced to explain and apply it to the contract thus made.

The doctrine there enunciated is in accordance with the decisions of that state.¹

§ 415. Where the note or memorandum does not clearly define the article, thing or property to be delivered, while comparisons in *degree* or *quality* will not be allowed, parol evidence may be admitted to identify the subject-matter. Thus in the case of *Pike v. Fay*,² where “white willow cuttings” were contracted for, parol evidence was admitted to enable the purchaser to show that the sale was by sample, and the article tendered did not correspond with such sample. Parol evidence is likewise admissible to explain and show what was meant by certain terms and phrases mentioned in the contract,³ even if the terms or phrases are not

¹ *Moss v. Green*, 41 Mo., 389; *Zabr. (N. J.)*, 96; *Foley v. Mason*, 6 Briggs v. Munchon, 56 id., 467; Md., 37.

Moore v. Mountcastle, 61 id., 425, and *Ridgway v. Ingram*, 50 Ind. R., 145.

² 101 Mass., 134, 137; *Benjamin on Sales*, 213; *Sweet v. Shumway*, 102 Mass., 365; *Hart v. Hammett*, 18 Vt., 127; *Gray v. Harper*, 1 Story, 574; *Steward v. Scudder*, 4

³ E. G. “consigned to M. & S.” at the bottom of a bill of parcels, goods sold, *George v. Joy*, 19 N. H., 544; and “terms cash” on a bill, and in a memorandum “bought 150 tons of madder, 12½, 6 ms.” *Dant v. Fielder*, 2 Kernan, 40.

technical, scientific or ambiguous. The price may also be ascertained by parol proof, if it was not agreed upon when the bargain was made.¹

In *Salmon Falls Manufacturing Company v. Goddard*,² the following memorandum was held sufficient under the statute, although certain terms had to be explained by extraneous evidence:

"September 19, W. W. Goddard, 12 mos. 300 bales S. F. drills, 7 $\frac{1}{4}$; 100 cases blue do., 8 $\frac{3}{4}$. Credit to commence when ship sails, not after December 1 — delivered free of charge for truckage. The blues, if color satisfactory to purchaser. (Signed) R. M. M., W. W. G."

§ 416. In *Schultz v. Bradley*³ it is held that an executory contract for the sale of a specific quantity of goods cannot be modified by a parol agreement increasing the quantity to be delivered, and so engraft it on the original contract as to escape or evade the rule prescribed by the statute of frauds.

§ 417. In *Macomber v. Parker*,⁴ Wilde, J., enunciated the controlling principle in such cases. He said that where any operation of weight, measurement, counting, or the like, remains to be performed, in order to ascertain the price, the quantity, or the particular commodity to be delivered, and to put it in a deliverable state, the contract is incomplete until such operation is performed.

§ 418. So also Parker, C. J., in the early case of *Higgins v. Chessman*,⁵ held that if, at the time of the contract, it is understood and intended that some after-act is to be done to complete the sale, such as a formal delivery, or a bill of sale, the transfer is not complete until such act is done.

¹ *Whitmarsh v. Conway Ins. Co.*, 1887; *Lingham v. Eggleton*, 27 16 Gray, 359; *Hoadley v. McLaine*, Mich., 324.
10 Bing., 482.

² 14 How. (U. S.), 446.

³ 57 N. Y., 646; *Brown v. Sanborn*, 21 Minn., 402.

⁴ 13 Pick. (Mass.), 175, 183; *Warner v. Feige*, 8 West. Reporter, 143, decided in Michigan, Feb.,

⁵ 9 Pick. (Mass.), 7; *Byles v. Collier*, 54 Mich., 1; *Ropes v. Lune*, 11 Allen (Mass.), 591; *Stone v. Peacock*, 35 Maine, 385; *Marble v. Moore*, 102 Mass., 443; *Foster v. Ropes*, 111 Mass., 10.

And it was so substantially held in *Champion v. Plummer*,¹ where the plaintiff, by his agent, wrote in a memorandum book the terms of a verbal sale to him by the defendant, and the defendant signed the writing, but the words were simply, "bought of W. Plummer," etc., with no name of the person who bought.

§ 419. In the light of numerous authorities, it may be observed that the intention of this clause of the statute of frauds is not to declare void a contract in the absence of the formalities prescribed, nor to dispense with the proof of consideration which is necessary under the common law; nor is any additional efficacy given to written contracts over and beyond what they previously possessed.² It aims to define the exact line between the negotiation and the contract.

While the statute contemplates and presupposes a contract by parol, it in no wise contravenes the principles of the law of evidence relating to written contracts. Hence a reasonable construction is that, if the party to be charged has put his signature to a note or memorandum, in compliance with the statute of the state where the contract is made, it is sufficient. The legal effect of a contract in writing is the same as it was before the statute was passed. The common law principle is, that a person entering into a contract may either reduce the same to writing, or may refer to some paper, letters, or documents, in existence embodying its terms, and in such case the parties are bound by what is thus written, and neither party can offer oral proof of any other or different agreement.³

¹ 4 Bos. & Pul., 252; *Allen v. Townsend v. Hargraves*, 118 Mass., Bennett, 3 Taunt., 169; *Jacob v. Kirk*, 2 Moody & Rob., 222.

² 2 Kent's Comm., 493, 494; *Day v. New York Central R. R. Co.*, 51 N. Y., 583; *Rosepaugh v. Vredenburg*, 16 Pick., 60; *Boyden v. Crane*, 7 Alb. L. Jour., 203; *Basford v. Pearson*, 9 Allen, 387; *Jelleson v. Jordan*, 68 Me., 373;

³ 1 Chitty on Contr. (11th Am. ed.), 153, and note U; *Pitcher v. Hennessy*, 48 N. Y., 415; *Small v. Quincy*, 4 Greenl., 497; *Tayloe v. Riggs*, 1 Peters (U. S.), 591; *Stoops v. Smith*, 100 Mass., 63; *Groot v. Story*, 44 Vt., 200. See *Bk. of Br. N. A. v. Simpson*, 24 C. C. P., 354.

§ 420. In *Christie v. Burnett*¹ several letters were introduced in evidence, which, read together in the light of the parol evidence which was allowed, were held sufficient to constitute a note or memorandum in writing within the seventeenth section of the statute of frauds. The court, Armour, J., in the course of his opinion delivered in the case, says that parol evidence is always admissible to show the situation of the parties at the time the writing was made; the circumstances under which it was made; the time when it was made, and the relative trades of the respective parties.

So, also, terms may be explained by parol in such cases.

§ 421. While some of the decisions hold that the contract must be mutual in order to be binding, the more recent cases have decided that the party to be charged, having subscribed the contract (according to the statute of the state where it is made), he cannot set up the statute in bar. It follows, therefore, that it is not necessary for both the vendor and vendee to sign the memorandum. But the name of the party in whose favor he is charged must somewhere appear in the writings.

§ 422. In the early case of *Lawrenson v. Butler*,² Lord Ch. Redesdale advanced the doctrine which for a time was considered sound, that to decree performance of a contract when one party only was bound would make "the statute really a statute of frauds," for it would enable any person who had procured another to sign an agreement to make it depend on his own will and pleasure whether it should be an agreement or not.

This opinion emanating from such high authority caused the courts for a time to pause; but they afterward embraced the sounder doctrine, and one more in consonance

¹ 10 Ontario R., 617. See, also, 52; Benjamin on Sales, Corbin's Sweet v. Lee, 3 M. & G., 466; ed., § 211 *et seq.*

Newell v. Rudford, L. R., 3 C. P., ² Sch. & Lef., 13.

with the statute, that, if the party to be charged was bound, it was sufficient.¹

It seems that the contract is good or not at the election of the party who has not signed.²

It is always competent to show the surrounding circumstances under which the memorandum was made in order to facilitate the remedy sought.³

§ 423. The universal construction given by the courts, that the memorandum in writing need only be signed by the party to be charged, has proceeded, not on the ground that contracts may not be mutual, but that the statute, in certain enumerated cases, has taken away the power of enforcing contracts which would otherwise be mutually binding, unless the parties against whom they are sought to be enforced have subscribed some note or memorandum thereof in writing.

Thus, if a contract is made, and one of the parties to it gives the other a sufficient memorandum, but neglects to take a corresponding one from him, he has but himself to blame if he is unable to compel its performance, while he is himself bound.⁴

And it may be doubted, said the court in *Smith v. Shell*,⁵ whether a party who has signed a memorandum can afterward claim that it does not contain all the terms of sale and is, therefore, insufficient; but it is clear that if the plaintiff himself shows such a state of facts he will be nonsuited. And no one but the parties to the contract can successfully raise the question or objection that the contract is void by the statute of frauds.⁶

¹ *Western v. Russell*, 3 Vesey & Beames, 192; *Ormond v. Anderson*, 2 Ball & Beatty, 370; *Barstow v. Gray*, 3 Greenl., 409; but see *Cabot v. Hoskins*, 3 Pick., 83.

² *Ivory v. Murphy*, 36 Mo., 534; *Dresel v. Jordan*, 104 Mass., 412; *Benjamin on Sales*, 255.

³ *Stoops v. Smith*, 100 Mass., 63.

⁴ *Williams v. Robinson*, 73 Me., 194; *Thornton v. Kempster*, 5 Taunt., 786; *Reuss v. Picksley*, L. R., 1 Ex., 342; 35 L. J. Ex., 218; *Starkie on Ev.*, vol. 2, p. 614.

⁵ 82 Mo., 217; 18 Cent. Law Jour., 478.

⁶ *Brown v. Hall*, 5 Lansing, 177.

§ 423*a*. Although there may be found cases to the contrary, it is well settled that the only signature required is that of the party against whom the contract is sought to be enforced. Hence the party designated in the memorandum, although he has not signed it, may at his election enforce the contract against the party who has signed it. In fact he is the only one who can. But the contract cannot be enforced against the party who has not signed the memorandum.¹

§ 424. The principal question presented in *Drury v. Young*² was, whether the note or memorandum must be delivered to the other party.

The statute is silent on the question of the delivery of the memorandum. Under the English adjudications it is held that the note or memorandum in writing *is equally corroborative*, whether it passes between the parties to the contract themselves or between one of them and his own agent.

After referring to Benjamin on Sales, *Gibson v. Holland*,³ and some other English cases, Stone, J., said that, from these authorities and the reasons upon which they were decided, he was of opinion that delivery is not essential to the validity of the note or memorandum of sale.

§ 425. While the memorandum is not required to be drawn in any prescribed form, and may be composed of several writings, such as documents, letters, etc., which may be construed together, the contract as gathered must be certain and complete.⁴ The contract may be proved by

¹ *Mason v. Decker*, 72 N. Y., 595; *Dresel v. Jordan*, 104 Mass., 412; *Newby v. Rogers*, 40 Ind., 9; *Ide v. Stanton*, 15 Vt., 687; *Getchell v. Jewett*, 4 Greenl., 350; *Old Colony R. R. Co. v. Evans*, 6 Gray, 25; *Ivory v. Murphy*, 36 Mo., 534; *Worral v. Munn*, 1 Seld., 229; *Lowery v. Mehaffy*, 10 Watts, 387; *Douglass v. Spears*, 2 Nott & McC., 207.

² 58 Md., 552.

³ 1 Law Rep. C. P., 1; *Johnson v. Dodgson*, 2 Mees. & Welsby, 653.

⁴ *Brown v. Whipple*, 58 N. H., 229; *Tallman v. Franklin*, 4 Kernan, 584; *Smith v. Arnold*, 5 Mason, 416; *Coddington v. Goddard*, 16 Gray, 443; *Lerned v. Wannemacher*, 9 Allen, 412; *Jackson v. Lowe*, 1 Bing., 9; 2 B. & P., 238; *Ridgway v. Ingram*, 50 Ind., 145; *Oakman v. Rodgers*, 120 Mass., 214;

parol; and the memorandum may be supplied by letters, written at various times, if they all appear to have relation to it. But even if letters have passed between the buyer and seller of goods, they do not constitute a sufficient writing to satisfy the statute of frauds if they vary in their description of the terms of the contract.

A printed bill of parcels delivered by the vendor to the vendee at the time of the sale, and a subsequent letter written and signed by the vendor, referring to the sale, has been held sufficient.¹ The signature to the memorandum by the party sought to be charged estops him from denying that the contract was legally executed.²

§ 426. The case of *Beckwith v. Talbot*³ discusses the question, among others, whether the memorandum required under the statute may be in several parts and of different dates. The case arose out of an agreement between the plaintiff, the defendant and two other persons to sell on shares two thousand two hundred and five head of cattle.

Several letters of the defendant to the plaintiff were introduced in evidence, and the question was whether they were sufficient to constitute a valid contract under the statute of frauds.

After quoting *Browne on Frauds* to the effect that the memorandum need not be contained in a single paper, *Brazee, J.*, says: "It is a well established rule of law that the note or memorandum evincing the agreement may be on one or many pieces of paper, contemporaneous, or of different dates."

After giving the dates, and extracting from the several

Thompson v. Menck, 4 Abb. App. Dec., 400; *Calkin v. Falke*, 1 Abb. Ct. App. Dec., 291 (1869); *Phillips v. Ocmulgee Mills*, 55 Ga., 633; *Bird v. Monroe*, 66 Me., 337; *Hunter v. Giddings*, 97 Mass., 41; *McCaul v. Straus*, 1 C. & E., 106; *Elliott v. Dean*, 1 id., 283.

¹ *Saunderson v. Jackson*, 2 Bos.

& Pul., 238 (1800); *Lee v. Hillis*, 60 Ind., 474.

² 2 Kent's Comm., 510; *Getchell v. Jewett*, 4 Me., 350, 366; *Williams v. Robinson*, 73 Me., 194. But see *Atwood v. Cobb*, 16 Pick., 227; *Small v. Quincey*, 4 Me., 497.

³ 2 Col., 639.

letters which were introduced in evidence, showing that they referred to the memorandum signed by the parties, the learned justice further says that it is said, in some of the cases, "that the mutual relation of the writings must appear upon their face, and cannot be shown by parol evidence," but that this rule is not uniform.¹ He held that the rule had no application in this case, as the party sought to be charged voluntarily introduced parol evidence to connect the writings; and that the letters, with the agreement, constituted such a memorandum subscribed by the party to be charged as takes the contract out of the statute of frauds.

§ 427. By the general statutes of the state of Colorado, a note or memorandum of the contract is required to be in writing and subscribed by the parties to be charged therewith.²

In the case of *Coon v. Rigden*,³ it appeared that February 15, 1876, certain cattle and other chattels were sold by John H. Rigden to one Yeager, under a bill of sale. On April 18 following, Yeager sold the same property to Caroline Rigden, also by bill of sale.

April 20, 1877, Yeager sued out of the district court a writ of attachment against the goods and chattels, etc., of said John H. Rigden, which was levied by the sheriff upon the property thus transferred, as the property of said Rigden.

On May 23, following, Caroline Rigden brought an action of trespass in the court against Yeager, and Coon, the sheriff, who made the levy.

On the trial a verdict was rendered for the plaintiff.

Yeager and Coon appealed.

There does not seem to have been any actual delivery under either sale. In each case the possession remained with Rigden.

¹ *Lee v. Mahoney*, 9 Iowa, 344.
See, also, *Jackson v. Lowe*, 1
Bing., 9.

² Gen. Stat. (1883), § 1521, subd. 4.
³ 4 Col., 275.

The court held that as between the parties actual delivery was not necessary; that title to chattels may pass though the possession may not change.

It was objected that the bill of sale from Yeager to the plaintiff was not *subscribed*, and was therefore void under the statute of frauds.

It appeared that across the face of the bill of sale were written the words: "Received of Caroline Rigden the sum of eleven hundred and twenty-five dollars."

Elbert, J., says: "The bill of sale and the receipt are evidently but parts of an entire contract. The one evidences the sale, and the other the payment of the purchase money. Why it was written across the face of the bill of sale does not appear. It may have been for want of space at the bottom of the page, or the whim of the party who drafted it. It is immaterial. The receipt stands at the end of the contract, and is subscribed by Yeager. This is a subscription of the entire contract, as much as if the receipt followed the bill of sale upon the same or the next page. To say otherwise would be an unwarranted refinement in testing the ordinary business transactions of daily life by the requirements of the statute."

The judgment of the court below was affirmed.

§ 428. It was held to be a sufficient memorandum to satisfy the statute where the defendant signed a letter canceling a contract and referring to an inclosed invoice, which contained all the terms of the contract.

Thus, in *Elliott v. Dean*,¹ the defendant wrote to the plaintiff as follows:

"JULY 17, 1882.

"MR. ELLIOTT:

"*Sir* — Owing to the warehouse stopping our machines, the stuff you have on order will not be wanted. Therefore I am sorry to say that I must cancel all orders you have got down for me. Sir, I remain yours,

"JAMES DEAN."

¹ Cababe & Ellis, N. P. R., 283.

Ten days thereafter another letter was written, as follows:

“JULY 27, 1882.

“MR. ELLIOTT:

“*Sir* — I return invoice that you sent us. I must also inform you that it is no use now. We have canceled the order, and I shall be surprised if you persist in sending either the spun or the invoice again, for we shall not have it under any circumstances whatever.

“Sir, I remain yours,

“JAMES DEAN.”

The invoice inclosed in the letter contained all the terms of the contract proved, save that the contract proved was of a sale of forty-four bundles of silk, while the invoice specified the quantity as four hundred and fifty-five pounds eight ounces. At the trial it was shown that a bundle of silk contained about ten pounds.

After stating the facts, Smith, J., said: “If the letter of July 27 had stopped at the words ‘no use now,’ the case would clearly have fallen within *Wilkinson v. Evans*,¹ where the defendants gave their reason for refusing the cheeses. But the letter goes on to say, ‘we have canceled the order.’”

It was contended that the memorandum was insufficient because it showed that the defendant no longer regarded the contract as existing, but the court thought that made no difference.

He further says: “The true test is: Does the defendant by his writing recognize and adopt the writing as embodying the terms which the parties had previously agreed upon?” *Bailey v. Sweeting*² strongly supports this view.

Judgment was for the plaintiff.

Where the letters or memorandum do not contain any reference to the quality of, or the time of payment for,

¹ 1 L. R. C. P., 407; 35 L. J. C. P., 224.

² 9 C. B. N. S., 843; 30 L. J. C. P., 150.

goods sold as agreed upon, they do not constitute a sufficient memorandum of the contract to satisfy the statute of frauds.¹

In the above case, for anything that appeared by the letters, the contract referred to might have been verbal.

"Hence," says the able Justice Stephen, "the case falls within the well-known class of cases of which *Peirce v. Cort*² is the latest, in which, in the case of sales by auction, it has been held that, if a signature by the auctioneer in his book is relied on as a memorandum to satisfy the statute, it is necessary that it should in some way refer to the conditions of the sale."

§ 429. One of the most recent and authoritative cases upon the sufficiency of the memorandum is *Doughty v. Manhattan Brass Co.*³ There the contract relied upon was contained in certain letters, and the question was whether their true construction disclosed a valid contract under the statute.

The appellants contended that they did not. The only reference to price was contained in a postscript to the defendant's letter, and that by itself was not subscribed. On that ground, principally, it was contended that there was no compliance with the statute. The defendant was a maker of brass hoops. The plaintiffs, as manufacturers of cedarware, required such article. They had dealt together for several years before this transaction.

On September 12, 1879, the defendant wrote to the plaintiffs as to certain orders already received, and gave some general information respecting the present and the probable future price of brass, which letter was subscribed. Below the signature were these words: "*P. S.— Will make price for November and December 17c. lb.*"

¹ *McCaul v. Strauss*, 1 C. & Ellis, 1886. See 18 N. Y. Weekly Dig., 327; *Newbery v. Wall*, 65 N. Y., 484; *Stagg v. Compton*, 81 Ind., 171; *Atwell v. Miller*, 6 Md., 10.

² L. R., 9 Q. B., 210.

³ 101 N. Y. Rep., 644; Central Reporter, vol. 2, p. 397, decided Feb-

In an exhaustive opinion, Danforth, J., said: "It is plain that the signature was intended to authenticate the paper, and in such case it is immaterial upon what part it is placed, whether at the beginning or the end, or in the middle. The postscript was an afterthought, but it was verified as effectually for the purposes of correspondence, as if written in the body of the letter to which it was added, and into which by reference it may be deemed incorporated."

The plaintiffs, answering the said letter September 15, 1879, gave a written order, signed by them, for "two tons of $\frac{11}{16}$ hoop brass, November 1st; two tons, December 1st;" and under date of September 17th, the defendant wrote: "Your order for November and December to hand and booked."

In a letter dated October 6, 1879, defendant said: "We will not fail to ship one thousand pounds per week, or more, until your order is filled." These writings were subscribed by the defendant. The court: "If the letter of September 12th stood alone as containing the contract, it would be necessary to hold that it was not subscribed within the intent of the statute;¹ but all the letters above referred to are so connected by their contents as together to constitute a note or memorandum for the sale of four tons of hoop brass, at seventeen cents per pound, to be delivered, one-half November 1st, and the other half December 1st. The proposal and final acceptance import a consent of both parties, and create an obligation on the part of the plaintiff to take and pay for the same, as delivered."

Upon the other question raised by the appellant, that the order of September 15th was indefinite, because it did not specify the required thickness of the hoop nor a stipulated time of payment, the court said, it is apparent that earlier orders had been given, and in part filled, and the one in question called for the same article, but at a different price; if otherwise, however, there was neither ambiguity in the contract nor any difficulty in performing it according to its terms. "No term of credit was bargained for, and, although

¹ James v. Patten, 6 N. Y., 9.

the complaint alleges that, by the agreement, payment was to be made on the first of the month after the goods were received, that allegation was not proved, and the question presented was simply one of variance between the complaint and proof, which the trial court might properly disregard."

The court, all concurring, decided that the writings taken together were sufficient to express a contract, and the judgment appealed from was affirmed.

This decision, emanating from so distinguished a tribunal, merits as it will command the respect of courts generally.¹

§ 430. *Smith v. Colby*² was an action upon an account annexed for goods sold and delivered.

The answer set up a breach of a special contract to deliver.

A memorandum signed by the defendant was offered in evidence in connection with two letters written by the plaintiff to the defendant. The trial judge ruled that these together did not prove the contract alleged.

The memorandum contained an agreement by the plaintiffs to furnish ten thousand croquet sets to the defendant at a stated price; it was dated, "Lowell (where the defendant lived), November 19, 1881;" the plaintiffs lived in Vermont.

The first letter is dated November 29, 1881, and in it, over the plaintiffs' signature, are the words: "We will undertake the croquet job upon the terms agreed upon when at your place." The other letter is dated March 7, 1882, and reads as follows: "We wrote you that we would undertake the job of ten thousand sets."

The court, W. Allen, J., thought the trial judge erred in his ruling, for that the letters, on their face, sufficiently refer to the memorandum.

He says: "The first letter must be presumed to refer to

¹ See, also, *Johnson & Miller v. Buck*, 6 Vroom, 338; *Richards v. Porter*, 6 Bing., 437; 13 C. L. R., 202; *Dobell v. Hutchinson*, 3 A. & E., 355; 30 Ch. R., 176. ² 136 Mass., 562, decided in February, 1884; *Smith v. Jones*, 66 Ga., 338; *Jones v. Isaacs*, 4 N. & McC., 563.

the agreement signed by the defendant and in the possession of the plaintiffs, and the memorandum and that letter would be sufficient to prove a memorandum signed by the plaintiffs within the statute of frauds; and proof of such a memorandum is sufficient proof of a contract in writing as alleged in the answer."

§ 431. In *Linsley v. Tibbals*¹ the plaintiff having talked with the defendant about hiring a strawberry patch of him for a stated time, and delivering a mowing machine by way of rent, the defendant wrote to the plaintiff a letter, saying: "Set your strawberries; let me have the mowing machine." This was held to be a sufficient memorandum under the statute of frauds of Connecticut, and the action was sustained.

§ 432. In *Buxton v. Rust*² an agreement was made to sell wool of greater value than £10. A. gave B. a written memorandum of the terms of sale, containing the words, "the whole to be cleared in about twenty-one days." B. afterwards wrote to A.: "It is now twenty-eight days since you and I had a deal for my wool, which was for you to have taken all away in twenty-one days from the time you bought it. I do not consider it business to put it off like this; therefore I shall consider the deal off, as you have not completed your part of the contract." The next day B. orally refused to deliver the wool to A. A. asked for a copy of the contract, and B. wrote to A. inclosing a copy of the paper written by A.: "I beg to inclose copy of your letter of January 11th." The court held that A.'s two letters, and the paper referred to in the second, formed together a sufficient memorandum under the statute of frauds.

§ 433. The memorandum is not sufficient if it is merely a scintilla of circumstantial evidence tending to show the essentials of the contract.

¹ 40 Conn., 522; *Reed v. Latham*, 40 id., 455.

² L. R., 7 Ex., 1. See, also, *Wilkinson v. Evans*, L. R., 1 C. P., 407; 35 L. J. C. P., 224.

Thus, in *Brown v. Whipple*,¹ the following correspondence was held to be insufficient to bind the defendant. This was the defendant's letter: "Lancaster, December 21, 1867. J. B. Brown, Esq., Dear Sir: Can you get twenty thousand feet of maple, the best quality, this coming winter, saw it in the spring (or winter), and deliver it at the depot at your place in July next? If so, for how much per thousand? Please call at my place when you are at Lancaster, and we will talk it over, or write me all the particulars. Respectfully yours, J. M. Whipple." The defendant's memorandum: "Rock maple, clear, for J. M. Whipple, fifteen thousand feet; ten thousand feet, two inches thick; five thousand feet, one and one-quarter inches thick. To be delivered at the railroad track. Price, \$20 per thousand." The plaintiff's letter: "May, 1868. John M. Whipple: The maple lumber which I agreed to get out for you is ready for delivery. Would like to have you call up and take the account of it, as I wish to draw it over to the railroad track. James B. Brown."

The court laid down the following rule: that "when one document refers to another, the latter is, for the purpose of such reference, incorporated with the former."² If the court, in construing the whole of them together, find that they contain all the terms of the bargain, they will be sufficient. But parol evidence cannot be introduced to connect them so as to satisfy the statute of frauds.

§ 434. The action of *Jenness v. Mount Hope Iron Co.*³ was in *assumpsit* for an alleged breach of contract.

It came before the court on a report, and the case was to stand for trial if the evidence of the plaintiff was sufficient, *prima facie*, to entitle him to damages.

The alleged contract was in regard to a large quantity of nails in kegs. The defendants admitted the negotiation,

¹ 58 N. H., 229; 19 Alb. Law N. H., 73, 83; *Church v. Brown*, 21 Jour., 381. N. Y., 315.

² 1 Starkie's Ev., 359, p. 580 of ³ 53 Me., 20. See, also, *McCaul* 4th Eng. ed.; *Simons v. Steele*, 36 v. Strauss, 1 C. & E., 106.

but denied that it ever ripened into a contract by which they were bound. The case rested upon several letters which passed between them, which, stripped of immaterial parts, amounted to the following:

Plaintiff. (Oct. 20, 1862.) "What will you sell me four hundred and fifty kegs of nails for, delivered at Bangor, in the course of a month, cash down?"

Defendants. (Oct. 23, 1862.) "We will sell you four hundred and fifty casks common assorted nails, delivered on the dock at Bangor, at \$3.62 per keg of one hundred pounds each, cash."

Plaintiff. (Oct. 27, 1862.) "Nails have advanced so much I am almost afraid to buy; but you will send me as soon as possible three hundred and three kegs of (naming the kinds), and I will send you a check on Exchange Bank, Boston."

Plaintiff. (Nov. 11, 1862.) "Not having heard whether you have shipped the nails ordered, I thought I would write you, as we shall have but a few weeks more of navigation."

Defendants. (Nov. 14, 1862.) "It will not be possible for us to get out the nails you have ordered this month, as previous orders must take precedence. It is next to impossible for us to get out nails enough to supply our back orders, and we thought it best to write you, as navigation may be closed too soon for us to forward them this fall. We will, however, do our best to satisfy all our customers, and your order shall receive attention when we get to it."

The court, Walton, J., in passing upon this correspondence, says: "We look in vain to find in it evidence of a contract completed." . . . "We look in vain for a distinct proposition by either party, which is accepted without modification by the other."

The learned justice states the requisites of a valid contract succinctly as follows: "To constitute a contract, there must be a proposition by one party, accepted by the other, without any modification whatever. If the acceptance

modifies the proposition in any particular, however trifling, it amounts to no more than a *counter-proposition*; it is not in law an acceptance which will complete the contract."

And he decided that the letters between the plaintiff and the defendants failed to establish a *prima facie* case for the plaintiff.

All the judges concurred.

§ 435. It seems to be settled by a long line of decisions that the subscription to the memorandum by the agent is a compliance with the statute, although the name of his principal do not appear upon it.

In such case the object of the statute is as fully satisfied as if it had been subscribed by or in the name of the principal.

Nor does the statute exclude parol evidence to show that a written contract for the sale of goods, purporting to be made between A. as seller, and B. as buyer, was in fact, on his part, made by him only as the agent of C.,¹ but the agent himself may be charged at the election of the opposite party, where he contracts in his own name without disclosing his principal. In all cases, however, where the principal has reaped the benefit of the agent's acts he is liable.

§ 436. But in *Fenly v. Stewart*,² where it was sought to hold the defendant as principal upon this memorandum: "For a valuable consideration to us in hand paid, we have sold A. M. Fenley two thousand five hundred bushels of canal oats, at forty-five cents per bushel of thirty-two

¹ *Dykers v. Townsend*, 24 N. Y., 57 (1861). So a broker's clerk may sign a memorandum for the broker. *Williams v. Woods*, 16 Md., 220; *Whitridge v. Parkhurst* 20 id. 62; *Wilson v. Hunter*, 7 Taunt., 295; *Cox v. Painter*, 6 Adol. & Ell., 491. In *Trueman v. Loder*, 11 id., 589, Lord Denman said parol evidence is always necessary to show that the party sued is the person mak-

ing the contract and bound by it. Whether he does so in his own name or in that of another, or in a feigned name; and whether the contract be signed by his own hand or that of an agent, are inquiries not different in their nature from the question, who is the person that ordered goods in a shop. *Higgins v. Senior*, 8 M. & W., 834.
² 5 Sandf. Super. C. R., 101.

quarts, to be delivered in this city at any time at our option between the 1st and 15th of June next, to be cash on delivery. New York, April 23, 1847. A. W. Otis & Co.;" and the objection was taken by the defendant that the memorandum was signed by the Messrs. Otis, in their own names, without any intimation, on its face, that they acted as agents of the defendants; and that they held themselves out as principals. The court said that it would be in contravention of the statute of frauds to allow the plaintiff, by parol evidence, to show that the defendant was in fact the principal.¹ That the Messrs. Otis were alone liable. That to allow evidence to be given that the party who appears on the face of the instrument to be personally a contracting party is not such, would be to allow parol evidence to contradict the written memorandum, which cannot be done.

Mason, J., further says: But where the contract of sale has been executed, so that an action may be maintained for the price of the goods, irrespective of the writing, there the party who has had the benefit of the sale may be held liable, unless the vendor, knowing who the principal is, has elected to consider the agent his debtor.² The judgment entered *pro forma* for the plaintiff was reversed on appeal.

§ 437. Whether a paper writing in a certain form is a mere offer, or is a memorandum in compliance with the statute of frauds, was passed upon in *Wemple v. Knopf*.³

The paper read as follows:

"MR. O. F. BRAND, of the North-Western Faribault Nursery:

"Please send me the following bill of nursery stock, to be delivered at Faribault, Rice county, Minn., during the months of October and November next. I agree to pay cash for all stock delivered at the price below mentioned, and should I fail to pay for the same when delivered, in-

¹ *Noakes v. Morey*, 30 Ind., 103; *1 Paine, C. C. R.*, 252; *Thompson Brown v. Sanborn*, 21 Minn., 402.

² The above distinction is recognized in *United States v. Parmlee*, *5 Comb v. Clark*, 1 Denio, 226.

³ 15 Minn., 440.

terest shall accrue thereon from the date of delivery until fully paid, at the rate of twelve per cent. (Here follows a schedule of the stock referred to in the order, and the prices, amounting to \$68.)

(Signed)

"G. W. WEMPLE, AGENT,

"ADAM KNOFF, JR.,

"*Wheeling, Rice Co., Minn., June 3, 1869.*"

Wemple was Brand's agent, and took the order as such agent.

The goods were delivered at Faribault, in October, 1869, and the defendant notified of the fact, but he refused payment.

Before the commencement of this action, Brand assigned the claim to the plaintiff.

No part of the goods had been accepted by the defendant. Upon this being shown in the trial court, the defendant moved to dismiss the action, on the ground that the sale was void, which motion was denied. Judgment was for the plaintiff.

The court, Berry, J., said: "There was an agreement signed by the party sought to be charged therewith in this action. As we have already held in *Morin v. Martz*,¹ this satisfies the statute. The order in this case is not a mere offer, as in *Lauz v. McLaughlin*,² but it contains a positive and express agreement to pay a named sum for the goods ordered."

The judgment was affirmed.

§ 438. In *Banks v. Harris Manufacturing Company*³ it appears that the defendants' traveling agent wrote to the defendants: "Send to C. W. S. Banks; terms net thirty days; freight allowed," signed by him as agent. Then fol-

¹ 13 Minn. R., 191. See *Chitty on Cont.*, 404-5; *Pym v. Campbell*, 6 Ell. & Bl., 370.

² 14 Minn., R. 75; *Wallis v. Littell*, 11 C. B. (N. S.), 370.

³ 22 Blatch. C. C., 103; 20 Fed-

eral Rep., 667; Vt. Cir. Ct. D. (1884); *Wheeler, J.*, 48 Am. R., 110; *Williams v. Bacon*, 2 Gray, 387; *Webster v. Zielly*, 52 Barb., 482; *Bird v. Monroe*, 66 Me., 337.

lowed a list of the goods desired, with the prices and directions for shipment, which was signed by the plaintiff.

This paper upon its face was merely an order.

While the writings taken together, substantially said the court, Wheeler, J., sufficiently set forth the terms of the sale, if they show a sale, and the name of the agent is sufficiently signed to the memorandum, if it is a memorandum of a bargain of sale, and he had authority to bind the defendant to such contract, yet it clearly appears to be *of an order and not of a sale*, within the meaning of the statute of frauds. As shown by itself it fails to constitute a sale without an acceptance of the order.

In all such cases it is decided that a contract of sale must be gatherable from the memorandum as against the parties sought to be charged.

§ 439. The action of McDonald v. Berwick¹ was brought upon the following paper writing: "Alpena, Mich., December 5, 1879. We agree to sell Malcolm McDonald one million feet of Norway, in town 28 north, 8 east, on our lands along Alger railroad; said Norway to be suitable for making square timber; and will make a contract with him, giving him the right to go on said lands and cut and remove said timber on payment for the same. The price of said Norway to be \$1.50 per thousand, board measure, and said timber to be selected Norway. We do not guarantee any certain amount of timber on said lands that McDonald will take, but do say that there is one million feet of good Norway and more. Berwick, Comstock & Co." The court held that this was not a contract, but "simply an offer to make one," with a statement of terms; that there was no mutuality, and therefore the plaintiff could not recover.

§ 440. The case of Justice v. Lang² is interesting, and is

¹ 51 Mich. R., 79; Governor, etc., 300; Story on Sales, §§ 124, 126; 1 v. Patch, 28 Eng. Law & Eq., 470; Parsons on Contr. (5th ed.), 475; Lees v. Whitcomb, 5 Bing., 34; Dilton v. Anderson, 43 N. Y., James v. Williams, 5 Barn. & Ad., 232.

1109; Quick v. Wheeler, 78 N. Y., ² 42 N. Y., 493.

one of the leading cases upon the particular subject under review.

The action was brought to recover damages for the non-delivery of certain rifles, upon the following memorandum:

“NEW YORK, 13th May, 1861.

“We agree to deliver to P. S. Justice one thousand Enfield pattern rifles, with bayonets, no other extras, in New York at \$18 each, cash upon such delivery; said rifles to be shipped from Liverpool not later than 1st July, and before if possible.

W. BAILEY LANG & Co.”

This appeal (the first appeal of the case to the court of appeals) was from a judgment entered upon the decision of the general term of the superior court of the city of New York, affirming a judgment dismissing the complaint upon the trial of the issues before the court below, and a jury.

The appeal was twice argued.

In an opinion covering over thirty pages, Lott, J., reviews the law on the subject of contracts generally, and as governed by the statute of frauds, and reaches the following conclusions: First, that a note or memorandum subscribed by the parties to be charged satisfies the statute of frauds;¹ second, that the fact that the party who does not sign it may not be liable thereon does not destroy the consideration which forms the inducement of the other party to make it obligatory by himself by complying with all the requirements of the law to make it so; and third, that the agreement of the defendants was a completed contract for the sale and delivery of the rifles at the price and upon the terms stated in the memorandum of the defendants, and supported by a sufficient consideration. The judgment of the court below was reversed and a new trial ordered. All concurred for reversal except Ingalls, J.

Judge Ingalls (dissenting), in a concise and well consid-

¹ See, also, *West v. Newton*, 1 ions recognized by Chancellor Duer, 277; *Woodward v. Harris*, Kent in *Clason v. Bailey*, 14 3 Sandf. Sup. Ct. Rep., 272. These Johns., 484. cases are in accord with the decis-

ered opinion, contended that it was not the intention of the legislature, in adopting the statute of frauds, to dispense with the necessity of having a consideration to support an agreement, but to require such note or memorandum in addition to such consideration. He further substantially held that if there had been even a slight consideration for the defendants' promise, and if the instrument in question had been subscribed by the plaintiff, and had contained a promise on his part to receive the rifles and pay for them, there would have been a good consideration for the defendants' promise.

He did not think that an executory contract, subscribed by one party, could be enforced without a consideration to support it, and therefore thought the agreement was void.¹

§ 441. In the second appeal, in *Justice v. Lang*, Mr. Judge Allen delivered the opinion of the court. The appeal was from the judgment of the general term of the superior court, affirming a judgment in favor of the plaintiff, entered upon a verdict. He adverts to the opinion of Mr. Justice Lott, and says the case presented a grave question; and without more consideration than he had given it, he would have hesitated before assenting to the conclusions of the learned judge, that a promise void in law, made by one party, was a good consideration for a promise by the other.

In the court below, on the second trial, the questions submitted to the jury were two, and those related to damages. The trial judge ruled that the plaintiff was entitled to recover, and "would allow but those two questions to go to the jury." The recovery rested upon the written promise of the defendants, and the verbal promise of the plaintiff, simultaneous with the written promise. The court says: There was no express agreement on the part of the plaintiff, that is, he did not then and there say, *in totidem verbis*,

¹ See *Cummings v. Dennett*, 26 South. (N. J.), 570, 573; *Smith v. Me.*, 397; *Nichols v. Allen*, 23 *Ide*, 3 Vt., 290. *Minn.*, 542; *Buckley v. Beardsle*, 2

that he would purchase and pay for the rifles. The plaintiff does not say, "that contract was accepted by me," and it is impossible that he intended to say that he accepted it at the time. The language is equivocal. What was intended by this equivocal expression was a question of fact.

After reviewing the evidence, and stating the rule as to the presumptions of fact and law,¹ the learned judge says: The undertaking of the defendants is, in form as well as in execution, unilateral. The act of the plaintiff in putting the memorandum in his pocket and walking off has no particular legal significance, and no inference can be drawn from it as a legal presumption.

The facts as presented in the case show that it was quite uncertain whether the memorandum was delivered absolutely, or in expectancy that a written order would be given by the plaintiff in form to make it a valid contract.

It cannot be presumed as matter of law that the defendants intended to accept from the plaintiff anything less than a promise valid in law, or that there was, in fact, a parol undertaking by the plaintiff; and if such an inference is to be drawn, it must be done by the jury as a presumption of fact, and not by the court as a presumption of law. The transaction must be spelled out from the facts proved.

As the principal fact was not proved, and as the circumstances are only evidence more or less cogent on the main fact, the reasonable inference deducible from them should have been passed upon by the jury.

§ 442. Although there were other questions involved, the court held that the views above expressed lead to a reversal of the judgment. A new trial was granted.

On the *third* appeal to the court of appeals,² it was unanimously decided that the findings of the referee upon the trial, as a question of fact, that the memorandum sued upon

¹ Broom's Leg. Max., 105; Best on Presumptions, 18; 1 Greenl. Ev., 48; Foster v. Steele, 3 Bing. N. C., 892.

² Justice v. Lang, 63 N. Y., 633; aff'g 39 Super. Ct. R., 283; Palmer v. Marquette & P. R. Mill Co., 32 Mich., 274.

was *not* delivered absolutely as a valid agreement, but conditionally, and that the plaintiff did not perform the conditions, was properly disposed of and was conclusive.

§ 443. In *May v. Ward*¹ the plaintiffs, in Boston, were dealers in sheet-iron; the defendant was a manufacturer of similar iron in Ohio. The action was brought upon the following memorandum: "I hereby agree to ship you balance of twelve cars sheet-iron which we owe you on a previous arrangement, same to be agreed upon at prices and terms as below, and specification not to exceed one car of heavy sizes heavier than twenty-one gauge and not more than one car of thirty gauge. Balance of specification to be No. 21 to No. 26 gauge; all specifications to be sent us at rate of one car-load per month." Then followed a list of prices for the different sizes per one hundred pounds, and the terms of payment. The plaintiffs' testimony tended to show that certain conversations which were had with the defendant at the time related to six cars, but the judge ruled that parol proof was not competent to show that fact. The contract, says the court, did not require the defendant to furnish "twelve" or any other definite number of cars of iron, and directed a verdict for the defendant. C. Allen, J., after stating that this was a contract for the sale of goods, not for labor and materials, said: Oral testimony is not competent to show how many cars were meant; that the essential terms must be contained in or ascertainable from the writing itself.

The memorandum was incomplete and uncertain. The words "same to be agreed upon" show that one element was to be agreed upon in the future. "The plaintiffs contend that the writing shows that at least two car-loads were to be shipped, and that the action may be maintained to recover for the failure to deliver at least that quantity. But the promise specified is to ship a balance 'to be agreed upon,' and is limited to such balance, and is not enlarged by

¹ 134 Mass. R., 127, decided January 6, 1883; *Brown v. Whipple*, 58 N. H., 229.

the following stipulations, which are provisional and dependent upon a previous determination by agreement. Till such determination, there is no agreement. The construction of the contract in this respect is the same as if the words were, 'the same to be determined by the award of A. B.,' in which case, until such award, the contract would not take effect." Accordingly, the judgment of the court below was affirmed.

The above opinion, though citing no authority, is concise and clear, like some of the early English decisions, and is sound law. The iron contemplated by the contract was not to be specially manufactured for the plaintiffs, but was such as was sold by the defendants in the usual course of their business; so that, under the Massachusetts doctrine, the contract was one of sale, and not for labor and materials. The memorandum did not contain the essential elements required under the statute, and was, therefore, void. The quantity of iron was not mentioned, and would have to be ascertained by some further agreement between the parties, and parol evidence is not admissible to supply such a defect.¹

§ 444. In *Ashcroft v. Butterworth*² the plaintiff by letter asked the defendants, "At what price will you fill my orders for gauge glasses?" The defendants replied: "We will supply you with gauge glasses at the same rates we supply the Ashcroft Manufacturing Company." The plaintiffs wrote August 27, "Our understanding with the company is bill at sight immediately on receipt of goods, and we hope you will comply with the same conditions," etc. "We have put you exactly on the same terms as the com-

¹ See *Ridgway v. Bowman*, 7 Pitcher v. Hennessy, 48 N. Y., 415; *Cush. R.*, 268; *Stoops v. Smith*, 100 Hakes v. Hotchkiss, 23 Vt., 281; *Mass.*, 63; *Tayloe v. Riggs*, 1 Peters Groot v. Story, 44 id., 200; *Eden v. (U. S.)*, 591; *Henderson v. Cotter*, 15 Blake, 13 M. & W., 614, etc.
² 136 Mass., 511, February, 1884; *U. C. Q. B.*, 345; *Mason v. Bruns-kill*, 15 id., 300; 1 Chitty on Cont. Atwell v. Miller, 6 Md., 10.
 (11th Am. ed.), 153, and note (u);

pany," etc., which letter also gave "the present price $8\frac{1}{2}$ d. per lb."

The defendants filled four orders of the plaintiff, for which the plaintiff paid by drafts dated from seventeen to twenty-three days respectively after the receipt of the goods. Then followed some correspondence as to the responsibility of the plaintiff, wherein the defendants wrote to the plaintiff: "If you can give us good reference or security your orders will be executed," etc. The plaintiff not furnishing such reference or security, the defendants refused to fill the orders. The question was whether they were liable for not filing the orders.

The court held that, as the plaintiff broke the contract, if one was made, and the defendants never having waived the breach, the plaintiff could not insist upon its further performance.¹

Field, J., said: "We are of opinion that no agreement is shown on the part of the defendants to send the plaintiff any gauge glasses that he might order, which became a complete contract by the plaintiff's sending an order. The whole effect of the correspondence, after the letter of August 27, is, that the defendants are willing to sell the plaintiff gauge glasses at the same rate and on the same terms as they sell the Ashcroft Manufacturing Company."

The statute of frauds had been pleaded.

It was decided that the ruling of the court below could not be sustained. Judgment for the defendant.²

§ 445. *Millar v. Fitzgibbons*³ was an action for damages for the non-delivery of certain paper, in pursuance of the following order which the plaintiffs gave to a salesman of the defendants:

"NEW YORK, 4—8, 1880.

"MESSRS. FITZGIBBONS, MESSER & Co.: Please furnish us

¹ *Withers v. Reynolds*, 2 B. & Mass., 204; *Oakman v. Rogers*, 120 Ad., 882.

id., 214.

² See *Whelan v. Sullivan*, 102 ³ 9 Daly, 505, decided February, 1881.

1,000 reams 36x40—40 lbs. to the ream *A* \$290 per 100 lbs., less 5 %, to be delivered in the month of April.

“Yours, etc., GEORGE W. MILLAR & Co.”

There was no written acceptance of the order by the defendants, and no money paid by the plaintiffs on account of it. The conclusion that this appeared to be a contract within the operation of the statute of frauds was sought to be overthrown by the plaintiffs by showing that the parties contemplated the manufacture of the paper, and so should be regarded as a contract for labor and materials, and not within the statute; but judgment was rendered for the plaintiffs.

The court of common pleas reversed the judgment.

Van Brunt, J., said: “It is admitted upon the part of the appellants that if any order of this kind is given to a manufacturer to manufacture the articles mentioned in an order, it is not within the statute; but it is claimed by them that where a vendor is *not* a manufacturer then such a contract is *within* the statute of frauds. I have been unable to find in the decisions of this state any case bearing directly upon this point, but an examination of the authorities leads me to the conclusion that the distinction is undoubtedly well taken.”

The court referred to the case of *The Passaic Manufacturing Co. v. Hoffman*,¹ where the leading authorities are reviewed, and it was decided that the distinction is recognized in the principle upon which it is held, that “contracts to manufacture are not within the statute of frauds, because they are, as those cases hold, contracts for the labor, skill, care or knowledge of the manufacturer who contracts to manufacture the article.” It was necessary for the plaintiffs to have gone further than they did, and actually have shown that the defendants were to manufacture the paper in order to take it out of the statute.

This decision seems to be consistent with the cases in New

¹3 Daly, 495.

York and some of the other states. In Massachusetts, however, a different rule obtains.

§ 446. A distinction has sometimes been drawn between proof of a contract, and proof of a compliance with the statute of frauds.¹ The question of compliance does not arise until the memorandum is put in evidence. In written contracts as such, the statute has no application.

A compliance with the statute of frauds may be proved either by earnest given, part payment, acceptance and receipt, or by a note or memorandum in writing subscribed by the parties to be charged. Where a memorandum is to be proved in accordance with the statute, it differs from a contract in writing, in this, that the memorandum may be shown to have been made at any time after the bargain, but before the action is commenced; and any number of writings may be made, all being equally originals and being connected physically or by reference to each other.

As already stated, a memorandum satisfies the statute of frauds if it is subscribed by the party to be charged, or by his authorized agent, and the terms of the contract can be gathered from the writings when taken together.²

§ 447. In *Egerton v. Matthews*³ the memorandum read as follows: "We agree to give Mr. Egerton 19*d.* per pound for thirty bales of Smyrna cotton, customary allowance, cash 3 per cent. as soon as our certificate is complete. (Signed) Matthews & Turnbull, and dated 20th of September, 1803."

Lord Ellenborough, C. J., decided that this was a requisite memorandum of the bargain; or at least of so much of it as was sufficient to bind the parties to be charged therewith, and whose signatures to it is all that the statute

¹ *Coddington v. Goddard*, 16 C. P., 298; *Croppe v. Cook*, L. R., 3 Gray, 436; *Sievwright v. Archibald*, C. P., 194.

17 Q. B., 115; 20 L. J. Q. B., 529; ² *Tallman v. Franklin*, 14 N. Y., 584, 588, rev'g 3 Duer, 395; *Grafton R.*, 8 C. L., 17; *Heyworth v. v. Cummings*, 99 U. S., 19; *Beck-Knight*, 17 C. B. N. S., 298; 33 L. with *v. Talbot*, 95 U. S., 289.

³ 6 East, 307.

requires; even though the consideration be not expressed in the memorandum. It adequately protected the party to be charged, and thus carried out the intention of the statute of frauds.

And in the well considered case of *Allen v. Bennett*,¹ it was held that the statute is satisfied if the memorandum be signed by the defendant, the vendor, although it be not signed by the vendee, and notwithstanding it could not have been enforced against the latter.

§ 448. In *Lee v. Hillis*² an action was brought upon an open account in the following form: "Terre Haute, Ind., 187-. A. P. Lee & Bro. (Then follows a list of the goods.) "Freight, ship Emp. line, sixty days' acceptance." Signed "Hills Bros., per E. F. Lock, April 21, 1875." The appellants' answer averred a purchase of certain goods of the appellees, through their agent, on a credit of sixty days. By mistake, the word *sold* was omitted from before the firm name of the appellants, and in the answer they prayed for a reformation of the memorandum in this respect, asking a set-off in damages for appellants' failure to ship the goods. A demurrer to the answer was sustained on the ground that a memorandum, to be sufficient within the statute of frauds, must state the contract with such reasonable certainty that its terms may be understood from the writing itself without recourse to parol proof.

§ 449. In the case of *Ashcroft v. Morrin*³ (which was tried at common pleas, Trinity term, in 1842), it appeared that on April 3d the defendants sent a letter from St. Vincent's to the plaintiffs in London, signed "J. & S. Morrin," as follows: "We dispose of a good deal of small liquor in our line, and Captain Nelson, of the *Emerald*, has recom-

¹ 3 Taunt., 169; *Johnson v. Dodson*, 2 M. & W., 653; *Douglass v. Norris v. Blair*, 39 id., 90; *Burke v. Haley*, 2 Gilman, 614; 1 Greenl. Spears, 2 N. & McCord, 207; *Ev.*, § 267; *Browne on the Stat. of Champion v. Plummer*, 4 Bos. & Fr., § 382; 2 Kent's Com., 511. Pul., 252.

³ N. Y. Legal Obs., vol. 1, p. 238.

² 66 Ind. R., 474, October, 1879; See, also, *Hanson v. Armitage*, 5 B. Ridgway v. Ingram, 50 Ind., 145; & Ald., 557.

mended us to try your house for these goods. We annex an order, which please to send by the *Emerald*. Let the quality be first and good and the terms moderate. We will either pay Captain Nelson or remit you bills for the amount." Then followed a list of the goods: "Porter, four hogsheads; brown stout, four hogsheads, not weakest, but of good body," etc.

The goods were shipped on board the *Emerald*, which vessel and cargo were lost on the voyage out.

The defendants refused to pay, and the plaintiffs brought this action to recover the value of the goods so shipped. The cause was tried at the sittings in London, before Creswell, J.

The defendants contended that there was not a sufficient contract to satisfy the statute of frauds; nor, in the absence of such legal contract, was there a sufficient acceptance by the purchasers, through delivery on board the *Emerald*, to raise a cause of action.

The appellate court, Tindal, C. J., decided that the words of the order being that the price should be moderate, no specific price being provided for, "the price could easily be ascertained," and makes the case entirely conformable with the provisions of the statute in that respect. The rule was made absolute.

As the goods were shipped by the *Emerald*, as directed by the order, there was, in contemplation of law, an acceptance and receipt; it was a valid contract.

§ 450. In *Ormand v. Anderson*¹ the learned judge adverted to the doubt expressed in *Lawrence v. Butler*,² whether courts of equity would specifically execute an agreement where *one* party only was bound; and he said that there existed no provisions in the statute to prevent the execution of such an agreement. He cited with approval the opinion of Mansfield, C. J., in *Allen v. Bennett*.³

The chief justice, in that case, observes that the cases of

¹ 2 Ball & Beatty, 370.

³ 3 Taunt., 169.

² 1 Sch. & Lef., 13.

Egerton v. Matthews,¹ *Saunderson v. Jackson*,² and *Champion v. Plummer*,³ hold the signature of the seller to be sufficient. He says it is the "daily practice of the court of chancery to establish contracts signed by *one person only*, and yet a court of equity can no more dispense with the statute of frauds than a court of law can." And Lawrence, J., in the same case, remarked that the statute clearly supposes the probability of there being a signature by one person only.⁴ The same construction *passim* has been adhered to in respect to contracts for the sale of lands.

§ 451. A subsequent modification of a contract in writing falls within the operation of the statute of frauds.

The principle of the common law, that it is competent to the parties at any time after a contract (not under seal) has been reduced to writing and signed to make a fresh parol contract, either to waive the written bargain altogether, to dissolve and annul it, or to subtract from it, vary, or qualify its terms, and thus to make a new contract, to be proven partly by the written contract and partly by the subsequent verbal terms engrafted upon what is left of the written contract, is not applicable to contracts of sale of goods under the statute of frauds. Thus, in substance, says Mr. Benjamin.⁵

And to the same purport says Kelly, C. B., in *Tyers v. Rosedale & Ferryhill Iron Company*.⁶ "It is now established," he said, "that a new verbal contract cannot be substituted for the original contract, where, by the statute of frauds, such original contract must be in writing."

Nor can a sale of goods under a written contract be enlarged by a subsequent parol agreement by additional goods.⁷ Nor parol evidence be admitted to change the place or time of delivery fixed in the writing; nor a change in any of the terms by any modification.⁸

¹ 6 East, 307.

² 2 B. & P., 238.

³ 1 B. & P. N. R., 252.

⁴ *Welford v. Beazley*, 3 Atk., 503;
Colton v. Lee, 2 Bro., 564; 18 Vesey,
183.

⁵ Benj. on Sales, § 216.

⁶ L. R., 8 Ex., 315.

⁷ *Schultz v. Bradley*, 57 N. Y., 646.

⁸ *Stevens v. Hall*, 9 Cush., 31;
Ogden v. Stewart, 60 N. Y., 419;
Cummings v. Arnold, 3 Met., 486.

CHAPTER XXI.

OF THE MEMORANDUM OR NOTE — CONTRACTS BY TELEGRAPH.

- § 452. Contracts by telegraph are within the statute of frauds.
- 453. The statute of several states on the subject.
- 454. Essentials of contracts by telegraph; construed as letters.
- 455. The same subject; *Hallock v. Commercial Insurance Company*.
- 456. Example of insufficiency of telegrams to constitute a contract.
- 457. Another similar example; *Watt v. Wisconsin Cranberry Company*; extrinsic evidence not admissible.
- 458. The same subject; *Whaley v. Hinchman*.
- 459. Parol evidence admissible to explain abbreviations.
- 460. Example where telegrams were held sufficient to satisfy the statute of frauds; *Trevor v. Wood*.
- 461. The same subject continued.
- 462. Example where certain telegrams were held to be insufficient; *North v. Mendel*.
- 463. What is a sufficient signing of the telegram; an agent may sign for his principal.

§ 452. There does not seem to exist any good reason why contracts by telegraph should not fall within the operation of the statute of frauds.

In fact the statutes of several states, in so many words, provide that contracts by telegraph are deemed to be contracts in writing.

In general the cases hold that a telegram is a written instrument, and when it embraces the essentials of a contract it satisfies the statute of frauds.

The same rules of construction are applicable to telegrams as apply to communications by letter.

Although the adjudications upon this subject are somewhat meager, there is sufficient material for the erection of a considerable judicial structure.

§ 453. In regard to such contracts, the statute of Indiana reads as follows: "Contracts by telegraph, between

two or more persons, shall be considered as contracts in writing.”¹

The following is the language of the statutes of California,² Nevada,³ Oregon,⁴ Utah:⁵ “Contracts made by telegraph shall be deemed to be contracts in writing; and all communications sent by telegraph, and signed by the person or persons sending the same, or by his or their authority, shall be held and deemed to be communications in writing.”

§ 454. The telegram, like the note or memorandum contemplated by the statute of frauds, must contain the same requisites; it must be complete in itself, and leave nothing to rest in parol. If, in an alleged contract of sale by telegraph, the telegram fails to show what property is contracted for; what the price to be paid for the property is; and to whom it is sold, the statute of frauds will not be satisfied.

Thus, it was said, in a well considered case by Woodruff, J.: “When, and to what extent, dispatches sent by parties to each other are to be treated *as written contracts*, or written evidence of their contracts, must depend upon the circumstances in which they are sent, and the intent and object for which they are transmitted and received.”⁷

In general a telegraphic message is held to be equivalent to a letter.⁷

§ 455. It should be steadily borne in mind, that, in gen-

¹ § 4180.

² Statutes, ch. 262, § 11, approved April 18, 1862.

³ Compiled Laws, vol. 2, § 3507.

⁴ Ch. 58, § 9.

⁵ Compiled Laws 1876, p. 198, § 11.

⁶ *Beach v. The Raritan & Delaware Bay Railroad Company*, 37 N. Y., 457; *Taylor v. Steamboat Robert Campbell*, 20 Mo., 254; *Rommel v. Wingate*, 103 Mass., 327; *Durkee v. Vermont Central Rail-*

road, 29 Vt., 127; *Dunning v. Roberts*, 35 Barb., 463; 7 Alb. L. Jour., 179; *Hazard v. Day*, Allen's Telegraph Cases, 320; *Goodwin v. Francis*, id., 420; *Leonard v. New York, etc., Tel. Company*, 41 N. Y., 544; *Henkel v. Pape*, L. R., 6 Exch., 7.

⁷ *Kinghorne v. Montreal Tel. Co.*, 18 U. C. Q. B., 66; Cent. Law Jour., April 22, 1881; *Dilworth v. Bostwick*, 1 Sweeny, 588; *Reed on Stat. of Fr.*, § 339.

eral, the question whether a contract has been made by telegraphic communications is to be determined by the same rules as in cases of communications by letter.

This subject is ably discussed by Vredenburg, J., in *Hallock v. Commercial Insurance Company*,¹ and the position taken that, when an overt act is done signifying an acceptance of an offer of purchase, a contract arises.

He says: "The overt act may be as various as the form and nature of contracts. It may be by the fall of the hammer, by words spoken, by letter, by telegraph, by remitting the article sent for, by mutual signing, or by delivery of the paper, and the delivery may be by any act intended to signify that the instrument shall have a present vitality.

"Whatever the form, the act done is the irrevocable evidence of the *aggregatio mentium*; at that instant the bargain is struck. The acceptor can no more overtake and countermand, by telegraph, his letter mailed, than he can his words of acceptance after they have issued from his lips on their way to the hearer. . . . There is no difference between the acceptance of a proposition by word of mouth and a letter stating an acceptance. In the one case it is articulate sounds carried by the air; in the other, written signs carried by the mail, or by telegraph. The vital question is, was the intention manifested by any *overt act*, not by what kind of messenger it was sent. The bargain, if ever struck at all, must be *eo instanti* with such overt act.

"Mailing a letter containing an acceptance, or the instrument itself intended for the other party, is certainly such an act."

§ 456. The recent case of *Lincoln v. Erie Preserving Company*² also involved the question of a contract by telegraph. There, the plaintiff, a broker and dealer at Boston, telegraphed to the defendants, a corporation at New York,

¹ 2 Dutcher (N. J.), 268; *Smith v. Easton*, 54 Md., 147.

² 132 Mass., 129.

September 26, 1879, as follows: "Telegraph how much corn you will sell, with lowest cash price. Buffalo."

The defendants answered the same day by telegraph: "Three thousand cases, \$1.05, open one week."

The plaintiff sent a telegram immediately, saying: "Sold corn, will see you to-morrow." These telegrams comprised all the memoranda in the case.

On the trial, for non-delivery of three thousand cases of corn, the plaintiff offered to prove that he had an interview with the defendants September 27, and they agreed to ship the corn; that the last telegram referred to a resale by himself of the same corn to one Hooper.

It was held on appeal, Allen, J., that the telegrams did not contain an offer by the defendants to sell to the plaintiff. The plaintiff was a broker, and had acted as a broker for the defendants, and also had dealings with them on his own account.

The court said: "Construing the first two telegrams together, the defendant says to the plaintiff that it will sell a certain quantity of corn, on certain terms, and within a certain time; but it does not say that it will sell to the plaintiff. It says in effect that it will hold the corn for a week, for the plaintiff to find a purchaser. The plaintiff's reply confirms this construction, for he does not say that he will take the corn, but that he has sold it, and will see the defendants the next day."¹

The court decided that as there was no evidence of any bargain or offer to sell the corn to the plaintiff, evidence of a subsequent oral promise by the defendants, or acceptance by the plaintiff, was properly excluded.

The telegrams taken together did not embody a contract sufficient to satisfy the statute of frauds.

¹ *Smith v. Gowdy*, 8 Allen, 566; *series*, 7 Allen, 563; *Wheat v. Champion v. Plummer*, 1 B. & P. Cross, 31 Md., 99; 1 Am. R., 28; N. R., 252; *Hazard v. Day*, 14 State v. Litchfield, 58 Me., 267; Allen, 487; *Stone v. Sanborn*, 104 *Smith v. Easton*, 54 Md., 138. Mass., 319; *Commonwealth v. Jef-*

§ 457. The case of *Watt v. Wisconsin Cranberry Co.*¹ is interesting.

The action was brought to recover damages for an alleged breach of contract to deliver to the plaintiff two hundred barrels of cranberries.

The contract relied upon consisted of certain telegrams. They read as follows:

“OCTOBER 15, 1881.

“To W. R. TAYLOR, Madison, Wis.: This car gone to Watt. Send best terms for another car-load to same parties.
W. B. BARNES.”

“OCTOBER 18, 1881.

“To W. B. BARNES, Tomah, Wis.: Will deliver to seven fifty. First-rate; better than before. Answer here at once.

“W. R. TAYLOR.”

“OCTOBER 19, 1881.

“To W. R. TAYLOR: Ship one car of best to Watt & Co. at your price.
W. B. BARNES.”

The evidence tended to show that Taylor was the president of the defendant company; that Barnes was a friend of Taylor and was requested by him to solicit from the plaintiffs orders for cranberries; that he solicited and obtained from them an order for a car-load, which order the defendant filled; that afterwards he solicited and obtained from them another order (for the cranberries in question), which was not filled; that Barnes undertook to communicate the order to Taylor by telegraph, and sent a telegram to the proper office in Wisconsin, directed to Taylor, being the one above set out under date of October 19. This telegram was never delivered to Taylor. It was also shown that Taylor's telegram to Barnes under date of October 18 was never delivered to the plaintiffs but was merely shown to them by Barnes.

No part of the purchase price was paid, and no recovery

¹ 63 Iowa, 730; 18 N. W. Reporter *hurst v. Van Cortlandt*, 1 Johns (N. S.), 898; Greenl. Ev., 268; Park- Ch., 280.

can be had unless the alleged contract, as constituted by the telegrams, is sufficient to take the case out of the statute.

Unless aided by extrinsic evidence, the alleged contract is unintelligible. The subject-matter of it is not mentioned. It is equally applicable to any kind of personal property that might be thus shipped. The trial judge ruled that the telegrams were insufficient to make a contract under the statute, and the appellate court decided that the jury was properly instructed to render a verdict for the defendant, and affirmed the judgment.¹

§ 458. Another example: In *Whaley v. Hinchman*² the plaintiff wished to purchase the premises which he was at the time occupying as defendant's tenant, and sent the following telegram:

"JANUARY 20, 1884.

"TO MAYOR A. HINCHMAN, WACO, TEXAS: I will take your house at \$3,000. Answer. C. WHALEY."

The defendant responded in the following telegram:

"WACO, TEXAS, 24.

"TO C. WHALEY, Pleasant Hill, Mo.: See J. B. Williams; if not sold, you can have it. A. HINCHMAN."

These telegrams comprised all the memorandum or note thereof in writing there was between the parties.

While the decisions hold that a contract by telegram may meet the requirement of the statute of frauds,³ the question here raised was, whether the subject-matter of the contract was sufficiently ascertained in the telegrams to avoid the statute. The court held it was not.

¹See *Howard v. Daly*, 61 N. Y., 366; 2 Abb. N. C., 70; *Trevor v. Wood*, 36 N. Y., 307; *Taylor v. Merchants' Ins. Company*, 9 How. (U. S.), 390; *Kinghorne v. Montreal Tel. Company*, 18 U. C. Q. B., 60; *McCulloch v. Insurance Company*, 1 Pick., 278; *Gillespie v. Edmondston*, 11 Ham., 583; *Prosser v. Henderson*, 20 U. C. Q. B., 438; *Adams v. Lindsell*, 1 Barn. & Ald., 681; *Scott and Jarnigan on Telegraphs*, § 304; *Merrill v. Western Union Telegraph Co.*, 78 Me., 97.

²22 Mo. App. R., 483; 5 West. Rep., 63.

³*Wells v. R'y Co.*, 30 Wis., 605; *King v. Wood*, 7 Mo., 389. But see *Springer v. Kleinsorge*, 88 Mo., 152.

§ 459. Parol evidence is admissible to the same extent, in explaining the contents of the telegram, as of contracts by letter; no more, no less. It has been held in several cases that parol evidence is admissible to explain abbreviations in a telegram, or letter, or note or memorandum.¹

§ 460. In *Trevor v. Wood*² it appeared that the plaintiffs and defendants were dealers in bullion; the one at New York, the other at New Orleans. They agreed to deal with each other in the purchase and sale of dollars, and that all communications in regard thereto should be by telegraph.

The appellants telegraphed to the respondents asking at what price they would sell one hundred thousand Mexican dollars. The respondents answered that they would deliver fifty thousand at seven and one-quarter.

The appellants immediately, January 31, telegraphed as follows:

"To JOHN WOOD & Co.: Your offer of fifty thousand Mexicans at seven and one-quarter accepted; send more if you can. TREVOR & COLGATE."

They also mailed a letter to the Messrs. Wood acknowledging the receipt of their telegram, and copying the appellants' telegraphic answer. The respondents on the same day mailed a letter to the appellants, copying respondents' telegram of that date.

February 1, the appellants telegraphed:

"To JOHN WOOD & Co.: Accepted by telegraph yesterday your offer of fifty thousand Mexicans; send as many more, same price. Reply. TREVOR & COLGATE."

This telegram, as also that of January 31, did not reach the respondents until 10 A. M., February 4, in consequence of some derangement in a part of the line used by the appellants, but which was not known to the appellants until

¹ *Salmon Falls Manufacturing Company v. Goddard*, 14 How. (U. S.) R., 446; *Scovell v. Griffiths*, 2 Mass., 12. *Hubbard's Administrators*, 21 Wend., 657; *Peich v. Dickson*, 1

Kernan (N. Y.), 509; *Spencer v. Babcock*, 22 Barb., 326; *Fish v.* ² 36 N. Y., 307.

February 4, when the telegraph company reported the line down.

February 3, the respondents telegraphed to the appellants: "No answer to our dispatch — dollars are sold," and on the same day they wrote by mail to the same effect. The appellants received this dispatch on the same day, and answered it on the same day as follows:

"To JOHN WOOD & Co.: Your offer was accepted on receipt;" and the next day, "the dollars must come or we will hold you responsible. Reply. TREVOR & COLGATE."

And again, February 4, insisting on the dollars being sent "by this or next steamer," and saying, "don't fail to send the dollars at any price." The same day, February 4, the respondents telegraphed to the appellants as follows: "No dollars to be had. We may ship by steamer 12th, as you propose, if we have them."

No dollars were sent, and this action was brought to recover damages for an alleged breach of contract in not delivering them. The referee found for the plaintiff in the sum of \$219.33.

It would seem from these facts that the offer was made on January 31, and the respondents did not attempt to revoke it until February 3. "The offer was accepted by the appellants before," says Scrugham, J., "but the respondents did not obtain knowledge of the acceptance until after this attempted revocation. The principal question, therefore, which arises in the case, is whether a contract was created by this acceptance before knowledge of it reached the respondents."

§ 461. The principle established in *Mactier v. Frith*,¹ and adhered to in *Vassar v. Camp*,² seems to settle the particular question herein involved. It is held there that it is only necessary that there should be a concurrence of the minds of the parties upon a distinct proposition, manifested by an overt act; and "that the sending of a letter announcing a consent to the proposal was a sufficient mani-

¹ 6 Wend., 103.

² 1 Kernan, 441.

festation and consummated the contract from the time it was sent."

The court said: "The sending of a letter accepting the proposition is regarded as an acceptance, because it is an overt act clearly manifesting the intention of the party sending it to close with the offer of him to whom it is sent, and thus marking that '*aggregatio mentium*' which is necessary to constitute a contract."

After quoting from the opinion of Marcy, J., in *Mactier v. Frith*, to the effect that acceptance depends largely upon circumstances; that where the offer is by letter the usual mode of acceptance is by letter; that keeping silence under certain circumstances is an assent to a proposition; and "anything that shall amount to a manifestation of a formal determination to accept, communicated or put in the proper way to be communicated to the party making the offer, would doubtless complete the contract;" and after stating the fact that the agreement between the parties was that they should transact business through the medium of the telegraph, Mr. Justice Scrugham says: "Under these circumstances the sending of the dispatch must be regarded as an acceptance of the respondents' offer and thereupon the contract became complete. I cannot conceive upon what principle an agreement to communicate by telegraph can be held to be in effect a warranty by each party that his communication to the other shall be received. On the contrary, by agreeing beforehand to adopt that means of communication the parties mutually assume its hazards, which are principally as to the prompt receipt of the dispatches." After making reference to the finding of the referee, that the respondents answered the telegram of the appellants asking at what price they would sell one hundred thousand Mexican dollars by another telegram as follows, viz.:

"TREVOR & COLGATE, New York: Will deliver fifty thousand at seven and one-quarter, per Moses Taylor. Answer.
JOHN WOOD & Co.,"

the court said: "It was proved at the trial that the telegram was sent by the respondents, and a letter of the same date, signed by them, repeating the telegram and stating that they had sent it, was read in evidence."

The court concludes that "this affords sufficient evidence of subscription by the respondents to take the case out of the statute of frauds."

The judgment was accordingly reversed.

§ 462. *North v. Mendel*¹ was an action to recover \$200 and upwards, "for five boxes pork bellies," shipped from Boston for Savannah, per steamship. The goods were shipped upon the order of one Freeman, who was dealt with as the agent of the plaintiffs.

The order was by telegram, which read as follows:

"Mendel five bellies, eight. Ehrlich offers seven-eighths ten bellies lighter than last."

On the same day, January 16, 1884, Freeman wrote in his entry-book the following:

"Sold account C. H. North & Co., Mendel, five bellies, eight."

The telegram and entry constituted the note or memorandum sued on.

The steamship on which the goods were shipped was wrecked and lost before reaching Savannah; the goods never reached the defendants.

The jury in the court below found for the defendants; a motion for a new trial was overruled.

The defense was that the defendants never accepted the goods; that nothing was given in way of earnest or part payment; and that the promise was not in writing and signed by them, nor by any person authorized by them to do so.²

The evidence tended to show that Freeman had dealt with the defendants as agent of the plaintiffs, and that the goods were to be paid for on delivery; while the plaintiffs' evidence tended to rebut these positions.

¹ 73 Ga., 400.

² Georgia Code, § 1950, sub-section 7.

Hall, J., decided that the memorandum, taken either by itself or in connection with the telegram, did not satisfy the requirements of the statute of frauds. He stated the rule to be as follows: "The statute does not require that all the terms of the contract should be agreed to or written down at one and the same time, nor on one piece of paper; but where the memorandum of the bargain is found on separate pieces of paper, and where these papers contain the whole bargain, they form together such a memorandum as will satisfy the statute, provided the contents of the signed paper make such reference to the other written paper or papers as to enable the court to construe the whole of them together as containing all the terms of the bargain.

"If, however, it be necessary to adduce parol evidence, in order to connect a signed paper with others unsigned by reason of the absence of any internal evidence in the signed paper to show a reference to or connection with the unsigned papers, then the several papers taken together do not constitute a memorandum in writing of the bargain, so as to satisfy the statute."¹

Even if the entry and telegram were united by the internal evidence furnished by themselves, still they would not satisfy the statute, as they do not show what property was contracted for, what price was agreed upon, and the parties to whom it was sold. The telegram is ambiguous and unintelligible, without explanation, or translation, and this the statute is intended to prevent.

In the words of the court, in *Smith v. Jones*, *supra*, the rule should not be relaxed now, when the flood-gates are open wide as to the competency of witnesses, and the only breakwater left is to put this class of contracts, and others of similar character, in writing.

The court, in the case under review, says: "The case in hand falls under no exception recognized by our law, and the testimony objected to on the trial by the defendants

¹ *Smith v. Jones*, 66 Ga., 338; *Benjamin on Sales*, 220.

should have been repelled.” The judgment in favor of the defendants was affirmed.

The opinion of the learned judge is such a clear exposition of the law involved in all such cases, it has been deemed of sufficient value to give the same quite at length.

§ 463. In *Goodwin v. Francis*,¹ where the original contents for a telegram were signed by a party, and the clerk of the telegraph company signed the message, it was held a sufficient signing to satisfy the statute of frauds.

¹L. R., 5 C. P., 295; *Bundy v. see McBlain v. Cross*, 25 L. T. (N. Johnson, 6 U. C. C. P., 221. And S.), 804.

CHAPTER XXII.

CONCERNING THE SIGNATURE OF THE PARTY.

- § 464. The words "signed" and "subscribed," as used in the statute of frauds.
- 465. Place of signature held to be immaterial in certain decisions.
- 466. Where signature appears in body of memorandum, a matter of intention.
- 467. The statute of frauds of New York; early cases on the subject of signature.
- 468. Cases of *James v. Patten* and *Davis v. Shields*.
- 469. Signature above the body of the memorandum held sufficient in an early Massachusetts case.
- 470. Same in New York before the amendment of the statute of frauds.
- 471. The same subject; *Coddington v. Goddard*.
- 472. A memorandum beginning, "I, A. B., agree," and not signed, held to be within the statute of frauds, discussed in *Hawkins v. Chace*.
- 473. Jury may determine whether the party is bound in certain cases.
- 474. Difference between "signed" and "subscribed;" both parties must assent to the contract; *Davis v. Shields*.
- 475. The case of *Davis v. Shields* further considered.
- 476. Case of signature in body of memorandum; held to be void. *McGivern v. Fleming*.
- 477. Conflict of authority as to signature by initials being sufficient to satisfy the statute of frauds.
- 478. Where the signature is printed it has been held sufficient.
- 479. The same subject; and where seal is used.
- 480. A simple *mark* by a party is sufficient.
- 481. Written part prevails over printed.
- 482. The material to be used in writing is a matter on which the statute is silent; it is left to convenience and usage.
- 483. The statute of frauds imports an informal writing in the hurry of commercial business.
- 484. The instrument to be used for writing is not mentioned; in different ages of the world different instruments have been used since the days of Job.

§ 464. The statute of frauds of the several states requires the note or memorandum to be either "signed," or "subscribed," by the parties to be charged.

In general, where the statute simply requires the note or memorandum to be *signed*, it is held to be sufficient if the signature be written or appear in any part of the instrument. On the other hand, it is well settled in those states¹ where the statute of frauds requires the note or memorandum to be *subscribed*, that the signature of the parties must be written or appear at the bottom thereof. In those states a strict construction is uniformly given to the word subscribed. In either case the intention of the parties must be gathered from the writing itself.

The word party or parties to the contract is not to be construed *party*, as to a deed, but *person* in general.

§ 465. There are numerous cases in the states where the word "signed" is used in the statute of frauds, which hold that a substantial signing is sufficient.²

Thus, in *Higdon v. Thomas*,³ the court held that it was entirely immaterial in what part of the instrument the name of the party to be charged appeared, if it was put there by him, or by his authority.

And in *Drury v. Young*,⁴ Stone, J., observes that the above decision settles the question that the place of signature in the memorandum "is immaterial."

The cases in New York, before the amendment of the statute of frauds in 1830, held to the same view.

The English cases are also equally emphatic that the name may as well be printed as written, if the printed name is adopted by the party to be charged.⁵

¹ California, Colorado, Minnesota, Nevada, New York, Oregon and Wisconsin.

² *Boardman v. Spooner*, 13 Allen, 357; *Fessenden v. Mussey*, 11 Cush., 127; *Salmon Falls Manufacturing Company v. Goddard*, 14 How. (U. S.), 446.

³ 1 Harr. & Gill, 139, 152.

⁴ 58 Md., 546.

⁵ *Roberts on Frauds*, 119; *Morrison v. Tonner*, 18 Ves., 175; *Saunderson v. Jackson*, 2 B. & P., 238; *Schneider v. Norris*, 2 M. & S., 286; *Bill v. Bament*, 9 M. & W., 36.

On the other hand, in the states where the word *subscribed* is used in the statute relating to the sale of goods, etc., the court have held to a strict construction and require the signature of the parties to be charged to be written or appear at the bottom or end of the note or memorandum.¹

In *Coon v. Rigden*² Elbert, J., observes that the "term 'subscribed' is a substitute for the term 'signed,' used in the English statute, 29 Charles II., and is held in its habitual use, and according to both its popular and literary signification, to require a signature at the *end* of a printed or written instrument."

§ 466. It has, however, in many cases very properly been held that, where the statute of frauds requires the memorandum to be signed, if the signature is not written, or does not appear at the end of the note or memorandum, it becomes a question of intention, to be determined by the other circumstances in the case, whether the name, if it be written or appear in the body of the memorandum, was appropriated by the party to the recognition of the contract.³ It would doubtless be a question for the jury to determine under all the facts and circumstances of the case.

§ 467. Under the revision of the statutes of New York in 1830, and in several other states, the statute of frauds requires the signature of the parties to be charged to be written or appear at the end of the memorandum — that is, to be literally subscribed.

Before this change in the statutes the decisions were quite uniform in holding that the signature was not required to be literal or formal, but that a substantial signing satisfied the statute.

The legislature evidently intended to insure a more accurate authentication. For, as was significantly said by a

¹ *Vielie v. Osgood*, 8 Barb., 130; *bell*, 3 H. & Munf., 144, 198; *Hawkins v. Chace*, 19 Pick., 502; *Batturs v. Sellers*, 5 Harr. & J. (Md.), 117; *Benjamin on Sales*, 259; *Ridgway v. Ingram*, 50 Ind., 145.

² 4 Colorado, 282.

³ *Coddington v. Goddard*, 16 Gray, 444; *Argenbright v. Camp-*

writer remarkable for precision in the use of language, "signing" does not *ex vi termini* mean that the name of the party to be charged shall be *subscribed*.

By a reference to the early cases, it will be found that before this amendment a pretty large license was taken in construing the language of the statute.¹ The word "signed" was applied to every written authentication.

The courts under the previous law, setting out with the supposition that a literal signing was unnecessary, had drifted, uncompassed, into a sea of incertitude, and thus it was deemed prudent to substitute the more clearly defined term *subscribed* for signed.

§ 468. In *James v. Patten*² the memorandum read:

"ALBANY, March 12, 1847.

"MR. THOMAS JAMES, bought of M. & S. Patten:

"For the relief committee, three thousand bushels yellow corn (fifty-six pounds per bushel), to be delivered at the opening of the Hudson river navigation at our store in Albany, at eighty-one cents per bushel, \$2,430."

It was in the handwriting of S. Patten. The principal contention of the defendants was that the memorandum was not subscribed by them. Judgment was rendered for the plaintiff; the defendants appealed to the general term³ where a new trial was denied. An appeal was taken to the court of appeals.

The statute of frauds of New York, passed February 26, 1787,⁴ and the English statute, 29 Car. 2, ch. 3, sec. 17, were substantially in the same words, requiring the note or memorandum of the contract to be "signed" by the parties to be charged.

When the New York statutes were revised in 1828, the revisers substituted the word "subscribed" for the word "signed."

¹ *McComb v. Wright*, 4 Johns. Ch., 663; *Clason v. Bailey*, 14 Johns. R., 484; *Downs v. Ross*, 23 Wend. R., 271.

² N. Y. (2 Seld.), 9.

³ See *James v. Patten*, 8 Barb., 344.

⁴ 1 Rev. L. of 1813, p. 79, sec. 15.

In his opinion, Paige, J., refers to the revision; to the current line of decisions before the word subscribed was used; to the case of *Davis v. Shields*,¹ where the subject is elaborately and learnedly discussed, and holds that the above memorandum was *not* subscribed within the meaning of the statute of frauds. Gardiner, J., in the same case, believed that the legislature intended to substitute the popular meaning for one adopted by judicial construction, and concurred with his associate for reversal of the judgment.

§ 469. In the early Massachusetts case of *Penniman v. Hartshorn*,² where the word "signed" is used in the statute of frauds, the signature was above the body of the memorandum nor was there any counterpart. In that state the word signed is used in the statute of frauds.

The memorandum read:

"DECEMBER 13, 1813.

▲ "HARTSHORN and ARNOLD, of Providence: I sold to the above gentlemen thirty-nine bales upland cotton at forty cents; sixty days for approved security.

"SILAS PENNIMAN.

"Bill to be made out in the names of H. & A., W. & B. and A. T."

It was objected that it was not signed in the manner intended by the statute. But Chief Justice Parker decided that it was sufficiently particular and explicit to satisfy the law, and cited *Egerton v. Matthews*.³ As the weight was not mentioned, the court held that, as bales of cotton are nearly of the same size, the ordinary average weight will be intended. And he further said that as the defendants were the parties to be charged, and as their signature appeared on the memorandum, it was sufficient to charge them.

§ 470. In the case of *Merritt v. Clason*⁴ Mr. Chancellor

¹ 26 Wend., 341.

² 13 Mass. R., 87; *Knight v. Crookford*, 1 Esp., 190.

³ 6 East, 307.

⁴ 12 John., 102; affirmed in 14 id., 487; *Parker v. Wilson*, 15 Wend., 346; *Roberts on Frauds*, 119; *Benjamin on Sales*, 259.

Kent substantially said that forms are not to be regarded, and the statute is satisfied if the terms of the contract are in writing, and the names of the contracting parties appear. But this case was before the amendment substituting the word subscribed for signed in the statute of frauds of that state.

In some of the earlier decisions even, the judges in giving to the word signed a judicial interpretation were governed by the intention of the parties as gleaned from the contract. But the extension of its meaning became by degrees so enlarged, in some cases, that it was held to include any mention whatever, in the memorandum, of the parties to be charged. So that if the name appeared in the memorandum as applicable to the subject-matter, it was considered immaterial whether the name was at the bottom or top; or whether it was a signature to a bargain, or merely mentioned in the writing as that of the buyer or seller.

The cases bearing upon this particular branch of the subject are numerous.¹ If, taking the signature in connection with the memorandum, it could reasonably be inferred that it was placed there to validate the contract, it was deemed sufficient. This seeming laxity of interpretation still exists to some extent in those states where the word signed is used in the statute of frauds.

§ 471. In the case of *Coddington v. Goddard*,² Bigelow, C. J., decided that it was quite immaterial whether the names of the parties to be charged were written at the bottom of the memorandum or not. He substantially held, that if the names are inserted in such manner as to indicate that it is their contract, and the terms of the bargain are completely expressed, it is sufficient. For the law looks to the substance and not to the form of the memorandum. As already indicated, a similar view was expressed by Chancellor Kent in an early New York case.

¹ *Proper v. Parker*, 1 Russ. & M., 216; *Gray (Mass.)*, 444, and cases 625; *Stokes v. Moore*, 1 Cox, 219; there cited.

² 1 P. Wm., 171; *Cabot v. Haskins*,

3 Pick., 83.

So, also, in *Hawkins v. Chase*,¹ the court went so far as to hold that a bill of parcels, in the usual form, written by a third person by the direction of the vendor, was a sufficient memorandum of the contract within the meaning of the statute of frauds of Massachusetts, where the word "signed" is used.

But in *Selby v. Selby*,² a letter from a mother to her son, beginning, "My dear Robert," and concluding, "Your affectionate mother," was held not signed so as to constitute a binding contract on the part of the mother, within the intent of the statute of frauds.

§ 472. In *Knight v. Crockford*³ it was substantially held that, if a man write an agreement beginning "I, A. B., agree," and not sign it, but leave a place for signature at the bottom, it may be taken as a memorandum in writing within the statute of frauds. And yet it seems no more than if it had been said, by A. B., that he would sign a particular paper.⁴

The court, in *Hawkins v. Chase*,⁵ in discussing the above case, was unable to refer to any case in which such a signature had been deemed good, unless where it appeared from the paper that the name was introduced by the party to be charged, in his own handwriting, as in *Knight v. Crockford*, and *Penniman v. Hartshorne*;⁶ or where the party making the memorandum has stood in such relation as to give effect to his act, to bind his principal or employer. "We think there is no doubt," said the court, "that if one is specially requested to sign or authenticate a paper for another, and he puts the name of his principal to any part of the paper for that purpose, it would be good, though we are not aware that any case cited is precisely to that point."

§ 473. In *Johnson v. Dodgson*⁷ the defendant, vendee,

¹ 19 Pick. (Mass.), 502.

⁴ *Hubert v. Treherne*, 3 M. & G.,

² 3 Mer., 2; *De Birt v. Thompson*, 743.

³ *Beav.*, 471.

⁵ 19 Pick., 505.

⁶ 1 Esp., 190; *Sarl v. Boudellon*,

⁶ 13 Mass., 87.

¹ C. B. N. S., 188; *Durrell v. Evans*,

⁷ 2 M. & W., 653; *Schneider v.*

¹ H. & C., 174; 31 L. J. Exch., 337.

Norris, 2 M. & S., 286; *Beckwith v. Talbot*, 95 U. S., 289.

wrote in his book the bargain as agreed, "Sold John Dodgson," and the plaintiff, the vendor, signed it. Lord Abinger said: "The cases have decided that, though the signature be in the beginning or middle of the instrument, it is as binding as if at the foot; the question being always open to the jury whether the party, not having signed it regularly at the foot, meant to be bound by it as it stood, or whether it was left so unsigned because he refused to complete it."

§ 474. The first case which arose under the statute of frauds, where a full consideration was given to the meaning of the word subscribed, was *Davis v. Shields*.¹ There Chancellor Walworth and Senator Verplanck clearly defined the difference between the words *subscribed* and *signed*, and lucidly illustrated the advantages of explicitness in the use of terms.

There one Green, a broker, was authorized by the plaintiffs to sell one hundred tons of English bar iron, which they were to receive (but not then arrived) per brig "Anna." Green offered to sell, and the defendant agreed to buy, fifty tons of said iron at the rate of \$70 per ton, "payable in six months" from its delivery, provided the iron arrived in good order within a reasonable time.

The agreement was not subscribed by either party, but Green made the following memorandum in his book:

"January 21st. Sold this day to George W. Shields, on account of Davis & Brooks, fifty tons of English bar iron.

Say.....25 tons $1\frac{3}{4}$ and $\frac{1}{2}$.

25 tons $\frac{5}{8}$

50

At 70 cents, to arrive on board per brig Anna. Said iron to be in good order or no sale."

The memorandum, it will be observed, does not contain the terms of sale as agreed upon, neither as to the purchaser not taking the iron if it did not arrive in a reasonable time

¹ 26 Wend. R., 342; affirming *S. Vaupel v. Woodward*, 3 N. Y. C., 24 id., 324, decided in 1841; Legal Obs., 132 (1845).

and in good order; nor as to the price of \$70 per ton; but it was assumed by the chancellor, that "the substitution of '70 cents' for \$70," was a mere typographical error in the printing of the memorandum.

Defendants claimed the performance of the contract; they tendered their note at six months in payment, and subsequently tendered the cash; but the plaintiffs declined to receive either and refused to deliver the iron. The plaintiffs had judgment. The defendant sued out a writ of error. On appeal, the court decided that the word subscribed, in the statute of frauds, required an actual subscription of the names of the parties to be charged, at the *end* of the contract.

Senator Verplanck, after an interesting exposition of the difference between the judicial and the popular meaning of the words *signed* and subscribed, said: "Adding, then, these manifest considerations of public utility to the cumulative evidence of the history of the law and the meaning of the words successively employed, either in their popular, their literary, or their legal signification, I cannot doubt at all that the subscription required by the statute is no longer satisfied by the bare mention of the name in the body of the memorandum, but must be such a subscription as clearly denotes a deliberate assent to the settled terms of a contract."

Chancellor Walworth also held that the name of the parties to be charged must be signed below, or at the end of the memorandum. That under the old statute, merely mentioning in a note of sale the name of the party sought to be charged was considered enough, but it was no longer sufficient.¹

"Although it is not necessary that both parties should subscribe the agreement," says the court, "to make it obligatory upon the one who does subscribe the same, it is necessary that they should both assent to such agreement to make it binding upon either."

¹ 2 R. S., 70, 136, sec. 3; Revised Notes, Parker v. Wilson, 15 Wend. R. 346; 3 R. S., 2d ed., 656-7; 346.

§ 475. In *Davis v. Shields*,¹ Senator Paige, one of the judges sitting on the appeal, dissented from the opinions of Chancellor Walworth and Senator Verplanck. He did not think the legislature intended to change the law; and believed that the word signed, as used in the statute of frauds, having received a fixed judicial construction, should be applied to the word subscribed as well.

In *James v. Patten*,² however, a case decided a few years later, Paige, J. (formerly senator), in delivering the opinion of the court, after reviewing a number of cases, and stating that he disagreed with the court in *Davis v. Shields*, said: "From my present examination of this question I am satisfied that I was mistaken in the opinion I then expressed."

Chancellor Walworth, in the subsequent cases of *Cole v. Browne*,³ and *Champlin v. Parish*,⁴ adhered to the same general opinion that he had expressed in *Davis v. Shields*. A like decision was also given in the supreme court, for the fourth district of New York, in *Vielie v. Osgood*.⁵ In *James v. Patten*, *supra*, Gardner, J., did not doubt the intention of the legislature in changing the phraseology of the statute, in giving to it the popular meaning—subscribed instead of signed.

§ 476. In the recent case of *McGivern v. Fleming*,⁶ the question as to the place of signature specifically arose. There, the contract sued on contained the signature of the defendant, which was in the body of the written memorandum, above and below which articles of merchandise were written.

The case was tried in the city court of New York, and a verdict rendered for the plaintiff. The general term of that court reduced the judgment to the extent of the items which were *below* the signature in the memorandum, and affirmed the judgment as to the residue.

¹ 26 Wend., 342.

⁴ 11 Paige R., 411.

² 2 Selden R., 16; 55 Am. Dec., 376; 40 Am. Dec., 698.

⁵ 8 Barb. R., 130.

³ 10 Paige R., 537.

⁶ 12 Daly's Rep., 289 (January, 1884); *Burrell v. Root*, 40 N. Y., 498.

The general term of the court of common pleas reversed the judgment and ordered a new trial. Van Hoesen, J., said: "It is obvious that, in the opinion of that court (the city court), if a note or memorandum of a contract for the sale of personal property be signed, not at the end, but in the midst of the list of articles sold, the contract may be split into pieces, and the fragments that precede the signing will be valid, while the fragments that follow the signing will be void. I am not aware of any decision that warrants such a construction of the statute. . . . The defendant has not *subscribed* the note or memorandum, and that he must do in order to bind himself."

The court held that the statute could not be circumvented in the way it seems to have been done in the court below.

The city court seems to have based its decision upon the Massachusetts and English cases, where the word signed is used in the statute.¹ But in New York, since the statute was amended by substituting the word subscribed for signed, a different rule of construction has been uniformly adhered to, as also in the other states where the word subscribed is used in the statute of frauds, and even where the word signed is used in the statute.²

§ 477. An able writer on the law of evidence³ declares that a signature by initials is not sufficient, within the meaning of the statute of frauds, and cites certain cases in support of his proposition.⁴ While on the other hand, a distinguished author of a work on vendors⁵ cites the same authorities in support of his conclusion that "it is sufficient, it seems, if the initials of the name are set down."

Neither of the cases referred to by the respective authors seems to be definite or decisive of the question.

It is, however, pretty well settled, that if only the initial,

¹ But see *Rand v. Mather*, 11 Cush., 1; *Haynes v. Nice*, 100 Mass., 327; *Boyd v. Eaton*, 44 Maine, 51; *Pecker v. Kennison*, 46 N. H., 488.

² *Drury v. Young*, 58 Md., 546.

³ *Roscoe on Ev.* (6th ed.), 265.

⁴ *Jacob v. Kirke*, 2 M. & Rob., 221; *Sweet v. Lee*, 3 M. & G., 452.

⁵ *Sugden on Vend. & P.* (11th ed.), 128, 144.

or initials, appear in the memorandum, it must be clearly made to appear that the same was so intended by the party who wrote it.¹

§ 478. There are some decisions holding that a printed signature is sufficient.

Thus, in *Torret v. Crupps*, determined in the high court of justice in England, in May, 1879, where the defendant wrote and sent a letter to the plaintiff containing an offer of lease, stating the terms, which letter was not signed in writing, but written on a sheet of memorandum paper the caption of which bore the printed words: "From Richard L. Crupps," and his address. Upon the plaintiff's acceptance of the offer, the defendant refused the lease, and the action was brought to compel specific performance. The defense was, that the signature did not satisfy the statute of frauds. The court, Hall, V. C., referring to *Schneider v. Norris*,² wherein the principle was discussed by Lord Ellenborough, says that, "where a party desiring to sell sends the party desiring to buy, a document containing the name of the former party, though it may be in print, yet in such a way as to show that the sender recognized it to be his own name, and the document contains the terms of a contract, that is a sufficient note in writing to charge the sender." That the document constituted, as far as regards the sender, a good contract under the statute of frauds, as well as according to the ordinary understanding.

So, it has been held in some English cases, where the name of the seller (the defendant) in the bill of parcels was *printed*, and he had written the vendee's name upon it, that it was a sufficient signing to satisfy the statute of frauds.³

§ 479. As already indicated, different modes of signing have been held sufficient. If a party is in the habit of

¹ *Saunderson v. Jackson*, 2 B. & M. Co. v. *Goddard*, 14 How. (U. S.), P., 238; *Caton v. Caton*, L. R., 2 H. 446.

L., 127; *Chichester v. Cobb*, 14 L. 22 Maule & Sel., 286.

T. (N. S.), 433; *Sanborn v. Flagler*, ³ *Beckwith v. Talbot*, 95 U. S., 9 Allen, 474; *Barry v. Combe*, 1 289.

Peters (U. S.), 630; *Salmon Falls*

printing his name instead of writing it, the insertion of his name in that form to a bill of parcels would be a sufficient signing to satisfy the statute.¹

If, in a bill of parcels printed with the name of the vendor, he insert the name of the vendee, this is held to be a sufficient signing and recognition of the printed signature to bind the vendor.² And if a seal be affixed to the memorandum in the presence of a witness who attests it, and is so placed in order to be binding, it was held in one case to be equivalent to a signing within the statute.

The above decisions seem to be held as good law in England, and in some of the states of this country, in which the statute of frauds contains the word signed; but in those states where the word subscribed is used, in order to be binding the name must be written or appear at the bottom or end of the memorandum.

§ 480. It is universally held by the American and English authorities, that if simply a *mark* be made by the party to be charged, it will be sufficient, and so will only the initials if so intended. Thus the conclusion follows that the statute does not require the memorandum to contain the actual subscription of the entire name of the party to be charged;³ and whether signed in ink, or pencil, or in stencil or stamped with the name,⁴ it is equally sufficient and binding.

¹ *Saunderson v. Jackson*, 2 Bos. & Pul., 238.

² *Schneider v. Norris*, 2 Maule & Sel., 286. Where B. wrote A.'s name over the printed words, "Bought of B. & Co. cotton yarn and piece goods," and underneath a list of goods and their prices, it was held sufficient to hold B. *Lemaine v. Stanley*, 3 Levins, 1; 1 Roll. Abr., 245, sec. 25. Sealing without signing is not a sufficient signing within the statute of wills. *Wright v. Wakeford*, 17 Ves., 454; *Ellis v. Smith*, 1 Ves. Jun., 11.

³ 2 Kent, 511; *Beckley v. Keenan*, 60 Ala., 293; *Baker v. Denning*, 8 Ad. & E., 94; *Harrison v. Elvin*, 3 Q. B., 117; *Sanborn v. Flagler*, 9 Allen, 474, 478; *Hubert v. Moreau*, 2 C. & P., 528; *Barry v. Coombe*, 1 Peters (U. S.), 640.

⁴ *Geary v. Physic*, 5 B. & C., 234; *Bennet v. Brumfith*, L. R., 3 C. P., 28; *Clason v. Bailey*, 14 Johns., 484; *McDowel v. Chambers*, 1 Strobh., 347; *Draper v. Pattina*, 2 Speers, 292. But see *Boardman v. Spooner*, 13 Allen, 353.

§ 481. It is also well settled that, if a contract be partly written and partly printed, the written matter will ordinarily prevail over the printed in case of any conflict between them.¹

§ 482. The statute of frauds is not only silent as to what material shall be used, but is silent also as to whether the letters are to be impressed upon paper, parchment or other substance. All this has been left to public convenience and usage; and as far as questions on this subject have arisen, the courts have, with great latitude and liberality, left the parties to their own discretion. It has, accordingly, been admitted that printing was writing within the meaning of the statute of frauds, and that stamping was equivalent to signing; and also, that making a mark was, within the statute, a subscribing.²

§ 483. In reasoning out the purpose and intention of the clause of the statute of frauds as to *signing*, it readily occurs that it imports an informal writing done on the spot, in the moment and hurry and tumult of commercial business; and that a lead pencil is generally the most accessible and convenient instrument of writing on such occasions. Chancellor Kent, in *Clason v. Bailey*,³ said: "I see no good reason why we should wish to put an interdict on all memoranda written with a lead pencil. I am persuaded it would be attended with much inconvenience, and afford more opportunities and temptations to parties to break faith with each other, than by allowing the writing with a pencil to stand."

In the case of *Merritt v. Clason*,⁴ Pratt, J., maintained the view that the memorandum required by the statute may be written with a lead pencil as well as with a pen and ink. In fact, in most of the reported cases on this head, the memoranda were written with a lead pencil.

¹ *Hill v. Miller*, 76 N. Y., 32; ² 2 Bl. Comm., 297.
Briggs v. Partridge, 64 id., 357; ³ 14 Johns., 484.
Clark v. Woodruff, 83 id., 518; ⁴ 12 Johns., 102.
aff'g 18 Hun, 419.

§ 484. Neither the statute of frauds, nor the decisions, declare that any particular material or instrument shall be used in writing the signature or memorandum.

Ideas by visible letters are expressed by writing, but the mode and manner of impressing those letters is no part of the definition of writing.

In different ages of the world various instruments, as well as different kinds of materials, have been used in writing; such as stones, metals, bark and leaves, wood, wax, ivory, shells and skins of animals. Instruments for writing have been chisels, styles of iron or bone, reeds and quills; while in ancient times, ink was made of the liquor of the cuttle-fish, cinnabar, etc.

In the days of Job it is said that writing was done upon lead with an iron pen; until finally parchment was used; and the calamus or reed was introduced.

CHAPTER XXIII.

OF THE PERSON LAWFULLY AUTHORIZED TO SIGN THE NOTE OR MEMORANDUM.

- § 485. An agent may sign the memorandum.
- 486. Agent lawfully authorized; statute of frauds of the several states as to.
- 487. Parol authority of an agent.
- 488. Special power in the agent.
- 489. When is the signature of the agent deemed the signature of the principal.
- 490. An example; *Bailey v. Clason*.
- 491. Similar examples.
- 492. When will the agent be personally liable under a contract made by him for an undisclosed principal.
- 493. What is a broker.
- 494. He acts for his principals; no effect passes out of him.
- 495. Is he agent of both parties.
- 496. The general practice of brokers in dealing for parties.
- 497. Effect of broker's entry in his book.
- 498. Example of a valid memorandum by broker; *Newberry v. Wall*.
- 499. A valid memorandum made and delivered to the contracting parties will bind them.
- 500. Principal bound though only the broker's name appear in the contract signed.
- 501. Where memorandum of broker was held insufficient.
- 502. Memorandum of broker; the case of *Bailey v. Ogden*.

§ 485. An agent is a person who acts by authority in the name and place of another.

In general the word agent includes also a special class of persons, as brokers, factors and auctioneers.

An agent, who is, strictly speaking, a third person, may have a general or special authority in relation to a special subject, or he may have a general power in relation to all subjects. His authority may be proved by parol in respect to contracts arising under the statute of frauds.

It may be stated as a principle governing the law of agency and evidence, that whether the statute of frauds contain a provision clothing the agent with authority to sign the note or memorandum or not, an authorized agent acting within the scope of his powers would bind his principal.

The fact of agency may be evidenced by a ratification of the acts of the person so acting, as also by antecedent delegation of authority.¹

§ 486. The statute of frauds of several of the states contains a clause to the general effect that the note or memorandum must be signed, or subscribed, by the party to be charged, or by his lawfully authorized agent, that is to say:

(a) By some person thereunto by him (the party to be charged) lawfully authorized;²

(b) or their agents lawfully authorized;³

(c) or by his agent;⁴

(d) or by his agent thereunto lawfully authorized;

(e) or by some person by him thereto authorized;⁵

(f) or their agents;⁷

(g) or by his lawfully authorized agent;⁸

(h) or some person by him lawfully authorized.⁹

(i) By 3 R. S. of New York, 5th ed., p. 222, § 8, it is provided: "Every instrument required by any of the provisions of this title to be subscribed by any party may be subscribed by the lawful agent of such party."

§ 487. Not only does a contract made by a duly authorized agent have the same binding force as if made by the principal himself, but the same rules apply as to the

¹Johnson & Miller v. Buck, 6 Vroom (N. J.), 338; Butler v. Thomson, 2 Otto, 412; Smith v. Arnold, 5 Mason, 414; Bent v. Cobb, 9 Gray, 387; Newton v. Bronson, 4 Kernan, 587.

²Indiana, Massachusetts, Maryland, Michigan, Vermont.

³Florida and Missouri.

⁴Dakota, California and Maine.

⁵New Jersey.

⁶New Hampshire.

⁷Connecticut.

⁸Iowa, Nebraska and Oregon.

⁹Georgia.

completion of it, to satisfy the statute of frauds. The maxim, *qui facit per alium facit per se*, is of universal application.

In the early case of *Sewall v. Fitch*,¹ an agent made a contract for the plaintiff with the defendant, for a quantity of cut nails, to be manufactured. It was there held that the rule as to a memorandum of a sale of goods made by an agent having merely parol authority satisfies the statute of frauds means a broker, or auctioneer, or other agent of *both parties*, not the mere agent of the vendee, or the agent of either party separately or singly. As the agent in that case was not a broker, or auctioneer, he was held to be a competent witness for the plaintiff.

The reasonable deduction from the cases is that, if there is no concealment or fraud, and the parties are made aware that the broker is acting for both buyer and seller, the act is not incompatible with the broker's duty.²

§ 488. In *Russel v. Carswell*³ a note was made by an agent, which was a special power and should have been strictly pursued. Abner Carswell authorized the agent to put his name to a note payable in six months, whereas he signed a note at sixty days. Livingston, J., said: "The note, then, as far as it concerned Abner Carswell, admitting there was no revocation, was made without his authority. His confession, after the suit was commenced, does *not* alter the state of the case. It was merely that he had allowed Davis Carswell to put his name to a note. This must have been the one of which the first witness spoke, which was to be payable in six months."

The court below having found for the plaintiff, a new trial was granted.

¹ 8 Cowen, 215; *Bennett v. Hall*, 10 Johns., 364; *Crookshank v. Burrell*, 18 id., 58. See *Lash v. Parlin*, 78 Mo. R., 397.

² *Hawkins v. Baker*, 46 N. Y., 666.

³ 2 Johns., 49, on the subject of agency. See *Fenn v. Harrison*, 4 Term R., 177; 3 id., 757; *Ringuist v. Ditchell*, 3 Esp. Cases, N. P., 64; *Hicks v. Hawkins*, 4 Esp. Cases, N. P., 114.

Where a party undertakes to do an act as the agent of another, if he does not possess the authority which he assumes, he will be personally responsible therefor to the person so dealing with him.¹

§ 489. In *Wiener v. Whipple*,² upon the sale therein involved being made, the plaintiff, and by the father as agent of the defendant, signed the following note or memorandum:

"Bought of Cass Whipple about three hundred bushels of barley, at sixty-five cents for fifty pounds, to be delivered by the 15th of September next. Paid on same \$25.

"Waterloo, August 24, 1880.

"A. WHIPPLE,

"S. M. WIENER."

After one load of barley had been delivered the plaintiff refused to accept more on the ground that it was not of the quality he bought.

Verdict for the plaintiff; the defendant appealed.

After citing several cases on the point, and stating that the signature of the agent is good under the statute of frauds, Taylor, J., says: "The signature of the agent in such a case is deemed the signature of the principal, and is a sufficient signing to take the case out of the statute."

§ 490. One of the earliest cases illustrating the binding force of an agent's memorandum is that of *Bailey v. Clason*.³

There, Clason employed one Townsend to buy a quantity of rye for him. Accordingly Townsend bought of Bailey & Voorhees three thousand bushels of rye, at \$1 per bushel. At the time of closing the bargain he wrote in his memorandum book, in the presence of Bailey & Voorhees, the following: "February 29th, bought for Isaac Clason, of Bailey & Voorhees, three thousand bushels of good mer-

¹ *Simmons v. More*, 100 N. Y., 117-124; *Noe v. Gregory*, 7 Daly, 143; *Baltzen v. Nicolay*, 53 N. Y., 283.

² 53 Wis., 298.

³ 14 Johns. R., 485.

chantable rye, deliverable from the 5th to the 15th of April next, at \$1 per bushel, and payable on delivery."

The terms of the sale and purchase had been previously communicated to Clason, and approved by him. When the time for delivery arrived Clason refused to accept and pay for the rye.

One of the objections to the contract raised on the appeal was that the contract was not valid under the statute of frauds, because it was not signed by Bailey & Voorhees; but the court held that the statute was satisfied.

§ 491. So in the case of *Batturs v. Sellers*,¹ where a sale of goods was made by a commission merchant, who delivered to the purchaser a bill of parcels, stating him to be the purchaser, it was held to be sufficient, although the name of the principal did not appear in the writing. But where a memorandum in writing was made by one Richards, a salesman of the appellee, as follows: "T. F. Hall & Co., 88 South Charles St., Baltimore, Maryland," following which was an itemized statement of the goods ordered and the prices agreed to be paid for the same, but was not signed by Richards nor by Hall, the contract was held not within the statute of frauds.²

§ 492. The question frequently arises whether or not the agent has bound himself, even though he describes himself as agent.

The recent case of *Murphy v. Helmrich*³ is a good case in point. The action was to recover the difference between the contract and market price of one hundred shares of San Francisco gas stock.

The defendants contended that there was no binding memorandum in writing under the statute of frauds. The

¹ 5 Har. & Johns. R., 117; *Goodwin v. Francis*, L. R., 5 C. P., 295.

² *McElroy v. Seevy*, 61 Md., 390.

³ 4 Pacific R., 958. Where an agent of two parties signed a memorandum in his own name, in the

absence of the parties, at his own instance, and for his own use and convenience, it was held not to be sufficient to take the case out of the statute of frauds. In *Noakes v. Morey*, 30 Ind., 103.

defendants' promise, on the 15th of October, to take the stock at a stipulated price, was verbal.

Upon the plaintiff sending word to the defendants that the stock was ready to be delivered, they declined to pay, but wrote:

"The purchaser of the one hundred shares of gas stock has not made his appearance, and it looks very much as if he was trying to back out. If you have accounted for the stock already, we will, of course, make the deficiency good; if not, would advise to do nothing in the matter, as there are to-day no buyers over ninety-four cents.

"Yours, etc., HANSEN."

Written on the back of the note was the following: "Will call as soon as I get a chance."

Same day plaintiff received this note:

"I have not seen the purchaser of the one hundred shares of gas stock, but we guaranty that it is all right at ninety-five and one-half, and you can account for it to your buyer at that rate. But we shall probably only take the stock to-morrow, unless we meet the party. Will that be in order?

"Yours, etc., HANSEN."

Afterwards the defendants declined to take the stock, but wrote that the plaintiff had better sell the stock. "But we cannot understand why you should wish to sell it on our account, as we did not buy it on our account," etc.

The plaintiff then sold the stock for \$87.50 in the market, and notified the defendants that he would hold them for the deficiency.

The defendants set up in their answer that they acted "solely as brokers and agents for others."

The court, McKee, J., said: "But their memoranda did not disclose the name of any principal," nor was evidence given showing for whom they acted.

Judgment in favor of the plaintiff was affirmed.

§ 493. A broker, in the popular as well as in the legal sense, is one who negotiates and concludes bargains for another, for a commission or compensation. He is strictly

a mere middle-man or intermediate negotiator between the several parties. He does not, ordinarily, act in his own name, but in the name of those who employ him. He is an agent employed to make bargains and contracts between other persons in matters of trade, commerce or navigation.

§ 494. If the contract which the broker makes between the parties be a contract of purchase and sale, the property in the goods, even if they belong to the supposed seller, may or may not pass by the contract. The property may pass by the contract at once, or may not pass until a subsequent appropriation of goods has been made by the seller, and has been assented to by the buyer.

Whatever may be the purport of the contract as between the principals, in either case no effect goes out of the broker. If he sign the contract, his signature has no effect as his, but only because it is in contemplation of law the signature of one or both of the principals. No effect passes out of the broker to change the property in the goods. The property changes either by a contract which is not his, or by an appropriation and assent, either of which is his. . . . He himself, considered as only a broker, has no possession of the goods; no power, actual or legal, of determining the destination of the goods; no power or authority to determine whether the goods belong to buyer or seller, or either; no power, legal or actual, to determine whether the goods shall be delivered to the one or kept by the other.¹

¹ Story on Agency, secs. 28, 30; 2 Kent, 4th ed., 622, note *d*; Worrall *v. Munn*, 1 Seld. (N. Y.), 229; Bray *v. Kittell*, 1 Allen, 80; Taintor *v. Prendergast*, 3 Hill, 72; Salkirk *v. Cobb*, 13 Gray, 313; Hinckley *v. Arey*, 27 Maine, 362; Shaw *v. Finney*, 13 Met., 453; Henderson *v. State*, 50 Ind., 235; Newton *v. Bronson*, 3 Kernan, 587; Bent *v. Cobb*, 9 Gray, 387; Smith *v. Arnold*, 5 Mason, C. C. R., 414; Hawkins *v.*

Chace, 19 Pick., 506; Blood *v. Hardy*, 15 Maine, 61; McWhorter *v. McMahon*, 10 Paige (N. Y.), 386; Pratt *v. Turner*, 6 Bing., 706; Harvey *v. Stevens*, 43 Vt., 655; White *v. Crew*, 16 Ga., 416; Horton *v. McCarty*, 53 Maine, 394; Farebrother *v. Simmons*, 5 B. & Ald., 333; Raynor *v. Linthorne*, 2 C. & P., 124, 544; Fowler *v. Hollins*, L. R., 7 Q. B., 616.

§ 495. A broker is not *ex vi termini* agent for both parties. The rule ordinarily laid down, that he is such agent, rests upon a presumption of fact, which may be rebutted by the particular circumstances of the case.¹

Where, however, a broker is the lawfully authorized agent of both parties, he may bind them by signing the same contract on behalf of the buyer and seller.²

§ 496. The general practice among brokers is, to make an entry of the contract in a book and sign it, and then to send a copy of it to each party, and, in general, the "bought note" to the buyer, and "sold note" to the seller, and these notes, duly delivered by the broker to the respective parties, have been held, if not the contract itself, proper evidence of the contract, constituting a sufficient note in writing to bind each party.³ And this is so even though the entry in the broker's book has never been signed by him. The parties cannot then recede from the contract. But if the broker deliver a different note of the contract to each of the contracting parties, there is no binding contract.

In *Hinde v. Whitehouse*,⁴ Lord Ellenborough, C. J., said, in respect to sales of goods by brokers, that it has been uniformly holden that a broker was an agent of both parties ever since the case of *Simon v. Metivier*,⁵ and it would be dangerous to break in upon a rule which affects all sales made by brokers acting between the parties buying and selling.

§ 497. In *Coddington v. Goddard*,⁶ the broker, under date, "Boston, December, 1856," made the following entry or memorandum in his book of the transaction:

"9. W. W. Goddard to T. B. Coddington & Co., two

¹ 2 Parsons on Contracts, 292; ³ *Rucker v. Cammeyer*, 1 Esp., 105; *Tremain v. Loder*, 11 Ad. & 792; *Dilworth v. Bostwick*, 31 E., 589; *Gorm v. Aflats*, 6 B. & C., 117.
² *Super. Ct. R. (N. Y.)*, 587; *Spyer v. Fisher*, 37 *Super. Ct. R. (N. Y.)*, 99.
⁴ 7 East, 558.
⁵ 1 W. Bl., 599.
⁶ 82 Mass., 436.

² *Blackburn's Treatise on Cont. of Sales*, Part 1.

hundred thousand pounds Chili pig copper, twenty-four and one-fourth at nine months from delivery, f. o. b., packed here for New York, seller paying freight and buyer paying insurance to New York. To be ninety-six per cent. pure copper, and paper satisfactory to seller."

No sale note, or letter relating to the sale or entry, was sent by the broker to the defendant. The memorandum by a broker is sufficient if the names of the parties to be charged are properly inserted, either by themselves or by some person duly authorized. The court said the purpose of the statute is answered, "if the names of the parties and the terms of the contract of sale are authenticated by written evidence, and do not rest in parol proof."

§ 498. In the recent leading case of *Newberry v. Wall*,¹ as it was claimed, a sale was made by the plaintiff through a broker, of "one thousand bales of Dowrah jute," to William Wall's Sons, of which firm the defendant was the surviving partner. The following memorandum was delivered:

"DANIEL L. STURGES,

"Hemp Broker, 111 Wall Street.

"New York, May 25, 1870.

"Sold for Messrs. Newberry & Son to Messrs. Wm. Wall's Sons, one thousand bales Dowrah jute, shipped at London for New York per ship American Congress, in good order and free from damage, at five and three-fourths cents per pound, gold, cash, payable in fifteen days from delivery alongside ship. Purchasers to advance gold for duties.

"Bkg. 1.20 per cent.

"DANIEL L. STURGES, Broker."

The appeal was from a judgment of the general term of the superior court of the city of New York, entered upon an order made November 22, 1881, which affirmed a judgment in favor of defendant, entered upon an order nonsuiting the plaintiffs. This was the second time the case came before the court of appeals.

¹ 84 N. Y., 580; 65 id., 484.

Earl, J., said: "In the prior case the commission of appeals impliedly decided that if the broker's note of the sale had been delivered to the defendants as well as to the plaintiffs, there would have been a valid contract of sale within the statute of frauds, and such is the law." After comparing the evidence given in the former trial and not finding it precisely the same, but sufficient to call for a different disposition of the case, the court says: "There was no evidence that the broker's note was not delivered to the defendants, and the evidence did not show certainly that it was so delivered, but we do not see how it can well be doubted that there was evidence sufficient for submission to the jury upon the question of such delivery."

§ 499. The facts in *Newberry v. Wall* were, that in May, 1870, the plaintiffs received notice of a shipment to them of the jute from London, and they employed the said broker to sell the same. The defendants made an offer for the jute, which offer was communicated to the plaintiffs, who accepted it, whereupon the broker apprised the defendants of the acceptance, and they replied, "all right." The broker then made a memorandum of the contract in his book and wrote two copies of the contract, which he signed, one of which, called the broker's note, he sent to the plaintiffs, which they actually received; the other copy he sent to the defendants, but as to its receipt by them there was no positive evidence. It was sent in his customary manner through one of his clerks, a boy fifteen years of age, but the boy was not produced, nor did the defendants deny that they received it.

In view of the above facts the court said that "little additional evidence was needed to authorize a jury to infer that it did reach them. . . . The broker testified that subsequently he had a conversation with one of the defendants as to his purchase of the jute, and informed him that he had executed the broker's note." On arrival of the jute the plaintiffs called upon the defendants to pay the duties. But instead of paying the duties defendants requested

plaintiffs to enter the goods at the custom-house in bond, which they did, and they delivered to defendants an order for the jute, and sent them an account specifying the quantity in bales and pounds, debiting defendants for the purchase price thereof, to which they made no objection. After an arrangement had been made by the defendants with the warehouseman for storing the jute, and after the warehouseman commenced carting the jute, defendants informed plaintiffs that they did not think it was such as they had bought, and told them not to store it on their account. The warehouseman stored it on account of whom it might concern.

The defendants then sent to the plaintiffs a letter saying: "On examination of the one thousand bales of jute we bought of you we find the whole to be in most respects different from any usually imported under that name; . . . it is not fit for manufacturing purposes, totally unsalable and unmerchantable, and hence we regret to inform you that we reject it and give up the purchase." And they finally rejected it upon the sole ground that "it was not such jute as they had the right to demand under their contract."

The plaintiff claimed that there was evidence tending to show such a delivery and acceptance of the jute, or a portion of it, as to satisfy the statute of frauds. But the judge decided the case upon the main ground that the evidence was "sufficient to authorize the inference by the jury that they had received the broker's note sent to them, and thereby considered themselves under a valid contract. The judge presiding at the trial therefore erred in nonsuiting the plaintiffs."¹

All the judges concurred, except Folger, C. J., who, being in doubt, did not vote; Rapallo, J., absent.

¹ See also, in regard to the questions involved in such cases, *Pinkham v. Mattox*, 53 N. H., 604; *Dal-
lard v. Potts*, 6 Allen (N. B.), 443; *Tower v. Tudhope*, 37 U. C. Q. B., 200; *Phillips v. Ocmulgee Mills*, 55 Ga., 633.

§ 500. A broker's memorandum in the purchase of railroad shares has been held binding upon the parties although the name of his principal did not appear in the contract.

Thus, *Dykers and Alstyne v. Townsend*¹ was an action to recover damages for the refusal of the defendant to receive and pay for eleven hundred shares of the capital stock of the New York & Erie Railroad Company, agreed to be purchased under three several contracts, as follows:

“NEW YORK, May 2, 1854.

“I have purchased of Dykers, Alstyne & Co. five hundred shares of the New York & Erie Railroad Company, at seventy (70) per cent., and deliverable in sixty days, buyer's option, with interest at the rate of six per cent. per annum.

W. S. HOYT.”

It was proved on the trial that Hoyt & Brown were brokers, and acted as the agents of the defendant in making the contract. On the trial, the defendant moved to dismiss the complaint on the ground that the contracts were signed only by B. and H. in their own names; that the name of the defendant nowhere appeared upon them; that parol evidence could not be introduced to show that the defendant was the person for whose benefit the contracts were made.

On appeal, by the defendant, the judgment in favor of the plaintiffs was affirmed by the general term.

§ 501. But in *Dennison v. Carnahan*,² as the facts appeared in the case, a broker, acting for both parties, purchased a lot of sugar from Dennison for Carnahan, and made an entry in his book, but which was not signed by either party, as follows:

“NEW YORK, August 9, 1850.

“For M. K. Carnahan, to C. & L. Dennison, one hundred and fifty barrels sugar, at five and five-eighths; four months.”

¹ 24 N. Y., 57. But see *Knight v. Barber*, 2 C. & K., 333; 61 C. L. R., 331. ² 1 E. D. Smith, 144.

The court held that this was not a sufficient memorandum within the statute of frauds.

§ 502. One of the earliest cases involving the question of form and sufficiency of a broker's memorandum under the statute of frauds is *Bailey v. Ogden*.¹ Kent, Ch. J. (afterwards chancellor), delivered the opinion of the court.

The fifteenth section of the statute of frauds of New York was then the same as section 17 of the English statute. The facts were, that, on December 14, 1804, one Huguet, a broker, acting for the defendants, negotiated with the plaintiffs for the purchase of a large lot of sugar imported by the plaintiffs. The quantity and price were agreed upon; the payment was to be in promissory notes at sixty and ninety days, with satisfactory indorsers. The broker, Huguet, assumed that the terms would be satisfactory to the defendants, but could not definitively know till J. Ogden, one of the defendants, returned to town. One of the plaintiffs made a memorandum of the bargain in a book. Huguet requested the plaintiffs to allow the sugars to remain in their store, the storage thereon to be paid after the expiration of the month, which was agreed to.

The following day the plaintiffs read to Huguet the memorandum which they had made the day before, as follows.

"14th December.

"Sold Huguet, for J. Ogden & Co., notes with approved indorser, — boxes white, ——— do. brown Havana sugars, at twelve and one-half for brown and sixteen and one-quarter for white, payable at sixty and ninety days; debenture we will receive in part payment."

Huguet pronounced this correct, but in regard to the "indorser" said the plaintiffs could fix that with J. Ogden on his return.

The broker, Huguet, wrote with his pencil in his memorandum book the following:

¹ 3 Johnson's R., 399-421 (1808).

“ 14th December.

“J. Ogden & Co.,	Bailey & Bogert,	
Brown 12 $\frac{1}{2}$	} sixty and ninety days.	
White 16 $\frac{1}{4}$		

Debenture part pay.”

Huguet then went to the defendants and told them that the plaintiffs demanded an indorser, and was told that they would have to wait until J. Ogden returned.

A fire occurred on the night of December 18, 1804, entirely destroying the sugar. Upon the return of J. Ogden, after the fire, he refused to give an indorser. Seven days after that date the plaintiffs delivered a bill of the sugar to the defendants, and demanded notes for the same, with indorser, which were refused.

The action was laid in *assumpsit*.

On the trial a verdict was rendered for the defendants, and the plaintiffs appealed.

The principal question raised on the appeal was, whether there was a memorandum in writing, binding upon the defendants within the meaning of the statute of frauds.

The memoranda of the transaction were comprised in the entry of the sale made by one of the plaintiffs in a book, and that made by Huguet, the broker. It will be observed that there was no memorandum signed by the parties to be charged. In the course of his opinion, Kent, Ch. J., says: “The numerous cases admitting an agreement to be valid within the statute, if signed by one party only, are all of them cases in which the agreement was signed by the party against whom the performance was sought. Some of the cases arose under the fourth, and others under the seventeenth, section of the English statute; but the words are, in this respect, similar, and require the same construction.

“It has, however, been said that there would be a want of mutuality if the plaintiffs in this case were bound by their entry, and the defendants should not be. The same difficulty has occurred in other cases; and Lord Redesdale, in

Lawrence v. Butler,¹ felt it so strongly, he observed, that to enforce every agreement signed by one party only, against such party, would be to make the statute really a statute of frauds, and that there was no late case in which one party only was bound by the agreement, where equity had decreed performance, though he admitted the import of the statute to be that no agreement should be in force but when signed by the party to be charged." He further says that "the agent of the defendants had authority to make the purchase, and any memorandum made by him respecting the purchase would be sufficient, but that the memorandum by him was too vague and indefinite to be a compliance with the statute."

He then proceeds to state the law governing the form and substance of a memorandum which the statute of frauds requires, and says it must state the contract with reasonable certainty, so that the substance of it can be made to appear and be understood from the writing itself, without having recourse to parol proof. This is the meaning and substance of the statute, and without which the beneficial ends of it would be entirely defeated.²

¹ 1 Schoaler & Lefroy, 20.

² *Champion v. Plummer*, 1 Bos. & Pul., 252.

CHAPTER XXIV.

OF SALES BY BOUGHT AND SOLD NOTES.

- § 503. Contracts by brokers; bought and sold notes.
- 504. Does the bought and sold note constitute the contract between the parties.
- 505. Where there is a variance between the notes delivered to the parties.
- 506. Construction of broker's note; *Butler v. Thomson*.
- 507. The same case; appeal to the supreme court of the United States, reversed, opinion by Mr. Justice Hunt.
- 508. Where a diversity appears between the bought and sold note; *Sivewright v. Archibald*.
- 509. Validity of sale-notes discussed; *Greeley-Burnham Grocer Company v. Capen*.
- 510. As to sufficiency of note, where the bought-note is not signed by the broker; *Sale v. Darragh*.
- 511. The same case; concerning acceptance in such transactions.
- 512. Where a part of the goods are delivered under a sale-note.
- 513. Delivery of bought and sold notes; a question for the jury.
- 514. Certain deductions.

§ 503. A large proportion of the commercial business of the community is done through the instrumentality of brokers. And bought and sold notes, as they are called, are frequently used, though no particular form seems to be required in their use.

There seem to be *four* kinds used, as in effect given by Mr. Benjamin: First, where the one note reads, "Sold for A. B. to C. D.;" and the other, "Bought for C. D. of A. B.;" or in substance those words, each containing the terms of the bargain.

Second, where the parties' names are not mentioned; the form being, "Bought for C. D.," and "Sold for A. B."

Third, where the broker appears to be principal and gives to the buyer, in substance, "sold to you by me," or words to that effect.

Fourth, where he professes to sign as broker, but is really a principal, and his signature does not bind the other parties.¹

It is well settled that neither party is bound if the broker does not sign the same contract for each party for whom he acts. In default of so doing there is no valid contract.² Neither party is bound.

But it is held that a contract signed by the vendee and delivered by the broker to the vendor, although it differ from the sold-note which the broker delivers to the vendee, is valid and binding upon the vendee.³ Such a transaction is relieved from the necessarily strict rule applicable to the acts of a broker as such.

The entry in the broker's book is, properly speaking, the original, and ought to be signed by him. The bought and sold notes delivered to the parties ought to be copies of it.⁴

§ 504. Bought and sold notes, as contracts, are ordinarily made by the broker at the time of the making of the contract, and before an entry is made in the agent's sale-book. Lord Ellenborough, in *Hinde v. Whitehouse*,⁵ says that, in all sales "made by brokers acting between the parties buying and selling, the memorandum in the broker's book, and the bought and sold notes transcribed therefrom, and delivered to the buyers and sellers respectively, have been holden a sufficient compliance with the statute of frauds."

But it would seem that if the broker is a *special agent* for *one* of the parties to the transaction, a different rule

¹ Benjamin on Sales, 276; Wilder v. Cowles, 100 Mass., 487; Torry v. Holmes, 10 Conn., 500; Merrill v. Wilson, 6 Ind., 426.

² Cumming v. Roebuck, Holt, 172.

³ Rowe v. Osborne, 1 Stark., 140.

⁴ Grant v. Fletcher, 5 B. & C., 436. In this case Abbott, C. J., ob-

serves that "a valid contract may probably be made by perfect notes signed by the broker, and delivered to the parties, although the book be not signed, but if the notes are imperfect, an unsigned entry in the book will not supply the defect."

⁵ 7 East, 558.

would apply.¹ In *Heyman v. Neale*,² Lord Ellenborough distinctly lays down the proposition that the bought and sold note does not constitute the contract. "What is called the bought and sold note is only a copy of the entry in the broker's book, which would be valid and binding although no bought or sold note was ever sent to the vendor or purchaser." And the judgment in *Sivewright v. Archibald*,³ although in contradiction of *Goom v. Afflalo*,⁴ and *Thornton v. Meux*,⁵ seems to be of a great deal of importance and weight.

In *Hawes v. Forster*,⁶ Denman, C. J., says: "I am of opinion that the plaintiffs have proved a contract by producing the bought-note. . . . It is not shown that the sold-note delivered to the defendants differed from the bought-note delivered to the plaintiffs. Had that been shown to be the case, it would have been very material; but, in the absence of all proof of that nature, I am clearly of opinion that *I must look at the bought-note, and to that alone*, as the evidence of the terms of the contract." Where the bought and sold notes differ, the evidence of the contract fails. The cases are distinguished in this.

§ 505. It is said by a writer on contracts, that, "where the broker delivers different notes of the contract to each of the contracting parties, and there is no signed entry in his books to cure the discrepancy, there is no valid bargain at all. There is no proof of the assent of the parties to the same terms. No common understanding."⁷ Thus, in *Moore v. Campbell*,⁸ where the broker was the agent of the plaintiff only, and the plaintiff claimed that the memorandum signed by the defendant was the contract, the court said

¹ *Coddington v. Goddard*, 16 Gray, 436; *Megaw v. Molloy*, 2 L. R. Ir., 530; *McMullen v. Helberg*, 4 id., 95.

² 17 Camp., 337.

³ 17 Q. B., 103.

⁴ 6 B. & C., 117.

⁵ M. & M., 43.

⁶ 1 Moo. & Rob., 368. But an immaterial variance will not avoid a contract. *Maclean v. Dunn*, 1 Moo. & P., 761. See *Parton v. Crofts*, 16 C. B. N. S., 11; 33 L. J. C. P., 189.

⁷ 1 Pars. on Cont., 544.

⁸ 10 Exch., 323.

the two memoranda must be considered together, and that, as they differed in material points, there was no evidence of any mutual agreement.

So, where one of the memoranda mentioned "Riga Rhine hemp," and the other "St. Petersburg clean hemp," it was held that there was no binding contract.¹

§ 506. The point involved in *Butler v. Thomson*² was whether a certain paper writing signed by a broker was a memorandum or sale-note sufficient to satisfy the statute of frauds.

It appeared on the trial that White & Hazard, metal brokers, were employed by the plaintiff to sell for him a large quantity of sheet iron, to arrive from Russia. The brokers offered the iron to the defendants verbally, at a price named, and the defendants verbally accepted it at that price.

The brokers then signed two papers, in the same words, as follows:

"NEW YORK, July 10, 1867.

"Sold for Messrs. Butler & Co., Boston, to Messrs. A. A. Thomson & Co., of New York, seven hundred and five (705) packs first quality Russian sheet iron, to arrive at New York, at twelve and three-quarter ($12\frac{3}{4}$) cents per pound, gold; cash; actual tare. Iron due about Sept. 1, '67.

"WHITE & HAZARD, Brokers."

Below was a memorandum of the number of packs of each of eight different sizes, numbers or marks. One of these memorandum notes so signed was delivered by the brokers to the plaintiff, and one to the defendants.

This paper was the only written contract between the parties.

The court decided that the two papers did not constitute a written contract of purchase and sale, within the statute

¹*Thornton v. Kempster*, 5 Taunt., 786. If the *meaning* be the same, be material. *Bold v. Rayner*, 1 M. & W., 343.

a difference in language will not ²11 Blatch. C. C. R., 534; 92 U. S., 412.

of frauds of the state of New York, and gave judgment for the defendant. Blatchford, J., after stating the facts, and quoting the New York statute of frauds, says: "The contract of purchase by the defendants is distinct from the contract of sale by the plaintiff. The plaintiff might very well have bound himself by a contract of sale, in writing, and subscribed as required, so as to have made himself liable thereon to the defendants, while the defendants did not bind themselves by a contract of purchase in writing, and subscribed as required, so as to have made themselves liable thereon to the plaintiff."

After citing *Grant v. Naylor*¹ and *Salmon Falls Manufacturing Company v. Goddard*,² the court denied the motion of the plaintiff for a new trial.

§ 507. The above case went to the supreme court of the United States,³ and the judgment of the circuit court for the southern district of New York was reversed, and the cause remanded to the circuit court for a new trial.

Mr. Justice Hunt, after stating the facts in the case; the statute of frauds of New York, as to the sale of goods for the price of \$50 or more; and after examining the agreement of many authorities, English and American, says: "Here both have signed the paper, and if a contract is created, it is a mutual one. Both are liable, or neither.

"Under these authorities it seems clear that there can be no sale unless there is a purchase, as there can be no purchase unless there be a sale.

"When, therefore, the parties mutually certify and declare in writing that Butler & Co. have sold a certain amount of iron to Thomson & Co. at a price named, there is included therein a certificate and declaration that Thomson & Co. have bought the iron at that price."

Touching the decision of the circuit court, the learned judge says: "The argument on which the decision below of the case we are considering, was based, is that the con,

¹ 4 Cranch, 224.

² 14 Howard (U. S.), 446.

³ 92 U. S., 412; 3 Cent. Law Jour., 383.

tract of sale is distinct from the contract of purchase; that to charge the purchaser the suit should be brought upon the bought-note, and that the purchaser can only be held where his agent has signed and delivered to the other party a bought-note, that is, an instrument expressing that he has bought and will pay for the articles specified. Mr. Justice Patteson [referring to the opinion of the learned justice in *Sivewright v. Archibald*, 6 Eng. L. & Eq., 286] answers this by the statement that the bought-note is always delivered to the buyer, and the sold-note to the seller.

“The plaintiff here has the signature of both parties, and the counterpart delivered to him, and on which he brings his suit, is, according to Justice Patteson, the proper one for that purpose, that is, the sold-note.”

After saying that Justice *v. Lang*¹ did not conflict with these views, and that the contract was perfect and obligatory upon both parties, the court reversed the judgment of the circuit court.

§ 508. In *Sivewright v. Archibald*² the subject of bought and sold notes is elaborately considered. In that case, as it appeared, there was a discrepancy between the bought and the sold notes. The sold-note was for a sale to the defendant of “500 tons *Messrs. Dunlop, Wilson & Co.’s* pig-iron.” The bought-note was for “500 tons of *Scotch* pig-iron.” In other respects the bought and sold notes were complete. It was held that such diversity between the bought and sold notes avoided the contract; and also, that the subject of the contract was not agreed upon between the parties. There was no entry in the sale-book of the broker signed by him. It appeared in that case, and the circumstance is commented on by Mr. Justice Patteson, that the practice is to deliver the bought-note to the buyer, and the sold-note to the seller. He says: “Each of them, in the language used, purports to be a representation by the broker, to the person to whom it is delivered, of what he, the broker, has done as agent for that person. Surely, the bought-note, delivered to the

¹ 42 N. Y., 493.

² 6 Eng. Law & Eq. R., 286.

buyer, cannot be said to be the memorandum of the contract signed by the buyer's agent, in order that he may be bound thereby; for then it would have been delivered to the seller, not to the buyer, and *vice versa* as to the sold-note."

It could not be determined which should prevail over the other. The court was divided. Instead, however, of making the rule absolute to enter the verdict for the defendant, a nonsuit was entered to give the plaintiff an opportunity to bring a fresh action. His lordship said, as there was no signed memorandum in the broker's book, the notes, or one of them, "must be the memorandum in writing signed by the defendant's agent, or there is none at all, and the statute will not be satisfied. If the bought and sold notes together be the memorandum, and they differ materially, it is plain that there is no memorandum."

The above case, and that of *Butler v. Thomson*, are deemed authoritative cases on this general question.¹

§ 509. The learned judge, in *Greeley-Burnham Grocer Company v. Capen*,² lucidly and ably discusses the sufficiency of certain "sold-notes" to take the case out of the statute of frauds.

Several cases were tried at the circuit, involving identical questions, and this appeal was taken as a test to determine whether the judgments should stand.

The actions were for the non-delivery of goods alleged to have been purchased of the defendant by the plaintiffs and their assignors, through S. B. Pike & Co., his agents for the sale of his goods.

The sale-notes were in effect as follows:

"ST. LOUIS, October 30, 1885.

"Sold to G. A. Eckerle & Co., for acct. of S. B. Pike & Co., twenty-five cases Am. $\frac{1}{4}$ sardines, at \$6 f. o. b. Portland. . . . Terms of sale, cash on arrival, less three per cent. Shipping directions, cheapest.

"WM. T. GOULD, Merchandise Broker."

¹ But see *Howell v. Maas*, 13 Daly, 222. ² 23 Mo. App. R., 301.

The appellate court sustained the holding of the court below, that the memoranda by which the contracts were evidenced were sufficient to take the case out of the statute of frauds.

Thompson, J., further says: "The objection that the time of delivery is not stated in this sold-note seems immaterial, because the law would annex the condition of delivery *within a reasonable time* under the facts of the case, in conformity with the manifest understanding of the parties."

A sale was also made, as appears in the case, without a sale-note having been given, but it was shown that the terms of the sale were reported by S. B. Pike & Co. to the defendant, and the reply of the defendant thereto was enough to show that he understood the contract.

"The memoranda, comprising the sale-notes, the correspondence by letter and telegram, relating as they do to the same subject-matter, make the terms of the sale," says the learned judge, "entirely clear without resort to parol evidence, and take the case out of the letter and policy of the statute of frauds."¹

As to the power of Pike & Co. to act as the agents of the defendant, the court reviews at great length the correspondence, letters and telegrams, and the phase which they bear upon that question, and concludes that such agency was sufficiently proved at the trial and affirm the judgment of the court below.

§ 510. The case of *Sale v. Darragh*² is also interesting, involving as it does the question of a broker's acceptance of goods.

There, the plaintiff, through a broker, sold to the defendant certain hemp, upon the following sale-note:

"NEW YORK, August 16, 1850.

"Sold for account of Mr. William A. Sale, Jr., to Mr. John

¹ See *Heideman v. Wolfestien*, 12 78 Mo., 391; *O'Neil v. Crain*, 67 Mo. App., 366; *Moore v. Mountcastle*, 61 Mo., 424; *Lash v. Parlin*, 22 Hilton, C. P., 184.

Darragh: — bales jute hemp, at \$80 per ton; six months. This hemp is to remain in store at the expense and risk of the seller, for the expiration of the first month; thereafter at the expense and risk of the purchaser. Mr. Darragh is to pay for this hemp as he may want to take it away, at the rate of eight per cent. per annum discount. Tare, six pounds per bale.

“JOHN E. FORBES & BRO.

“DANIEL L. STURGES.

“Broker in Fruits, Spices, Salad Oils, Hemp and Merchandise generally. 103 Wall Street.”

This memorandum or sale-note was delivered by Sturges, a clerk of the Messrs. Forbes, and by whom the sale was made, to the plaintiff. No bought-note was signed by the broker.

Although no number was mentioned in the sale-note, three hundred and fifty-six bales were sold. The bales were delivered as the defendant required, and paid for as taken away; the deliveries were between August, 1850, and January, 1852. The weight was marked on the bales before the sale.

As the defendant refused to take the rest (thirty-three bales), alleging them to be damaged, the plaintiff sold the same at a reduced price.

The defendant gave no special authority to the plaintiff to sell these bales on his account, nor did the plaintiff give the defendant any notice of his intention so to sell them. The plaintiff's loss was \$535, to recover which this action was brought.

The referee found that there was no sufficient note or memorandum of the contract, nor such an acceptance and receipt of part of the hemp required by the statute of frauds, as to charge the defendant as purchaser of the whole. On the latter question the referee expressed doubt.

§ 511. Although in his decision he states that, prior to 1830, the statute of New York was silent as to the time when a memorandum should be made, or a part of the goods accepted, or part of the purchase money paid, and

concedes that a subsequent delivery and acceptance would be equally efficient as if made at the time of the contract, yet the referee decides that there was not such a delivery and acceptance of part as contemplated by the statute. He evidently rested his opinion upon the case of *Seymour v. Davis*,¹ where it is held that a delivery and acceptance of a part of the goods must take place *at the time of the making of the contract*. "This decision," says the court in *Sale v. Darragh*, "was founded in a mistake." The justice, by a singular oversight, did not observe that the provision of the Revised Statutes as to time, touching the sale of goods, is confined to the subject of part payment, and does not refer to acceptance and receipt.

Daly, C. J., substantially says that, if the note or memorandum was insufficient under the statute, the evidence established an agreement for the sale of three hundred and fifty-six bales of jute hemp, upon the terms stated in the writing, which was afterwards consummated and became a valid contract by the delivery and acceptance of a part of the goods.

In regard to the sale-note not stating the number of bales he says: "Where it is apparent upon the face of the instrument that something is contemplated and agreed upon by parties, which they have not distinctly defined, or expressed with sufficient clearness, parol proof, connecting the instrument with its subject-matter, is always allowable to show what the parties intended and meant."

§ 512. The case of *Cole v. Swanston*² involved the question of part delivery under a sale-note. The plaintiff, through his agent Dore, sold to the defendants certain lumber on the following sale-note:

"Sold Messrs. Swanston & Taylor fifty thousand three hundred and twenty-five feet lumber *ex Duchess Clarence*, for account Captain Cole, at \$150 per thousand.

"*21st December, 1849.*

M. DORE."

Of this lumber twelve thousand nine hundred and fifty-

¹ 2 Sandf. S. C. R., 245.

² 1 Cal., 51.

eight feet were delivered; the balance, seventeen thousand six hundred and forty-nine feet, was sold by Cole on account, as was claimed, of the purchasers, at the price of \$760.72. That constituted the quantity on board the said vessel, and all that Cole owned. So that at the time of the sale the plaintiff only had thirty thousand six hundred and seven feet instead of fifty thousand three hundred and twenty-five feet, the quantity called for by the note.

No time or place was agreed upon for the delivery when the sale-note was made, although the course of conduct of both parties showed that it was contemplated that the plaintiff should deliver the lumber to the defendants in lighters at the side of the vessel; and the twelve thousand nine hundred and fifty-eight feet were so delivered.

The court of first instance, upon the referee's report, gave the plaintiff judgment for the fifty thousand three hundred and twenty-five feet at \$150 per thousand, after deducting \$650.05, the amount of the net proceeds of that portion which had been sold by the plaintiff at auction.

Bennett, J., said: "The delivery of the lumber and the payment of the purchase money are by the contract concurrent acts. Neither party can maintain an action against the other for non-performance, without showing a readiness and willingness to perform on his part."¹ The plaintiff was unable to perform his part of the contract, and, therefore, could not complain that the defendants were unable to perform their part.

The court decided that the plaintiff was entitled to recover the stipulated price for the quantity actually delivered, deducting therefrom the damages sustained by the defendants, by reason of the non-delivery of all the lumber.

§ 513. Where a broker's note of a sale made by him has been delivered to both the buyer and seller, it has been held to constitute a valid contract of sale within the meaning of the statute of frauds. The question, however, as to

¹ Chitty on Cont., 446, 7th Am. ed.; *Banker v. Hoyt*, 18 Pick., 457; *Story on Cont.*, § 845.

whether or not there has been a delivery of the sale-note, or a memorandum of the sale to the buyer, is a question of fact which is ordinarily submitted to and passed upon by the jury. The courts are uniformly cautious, under the principles of our jurisprudence, and properly so, in trenching upon or interfering with the province of the jury.¹

§ 514. Upon an examination of Mr. Benjamin's excellent treatise on the law of sales,² it will be seen that he draws several deductions from the English decisions on the subject of bought and sold notes.

In brief as follows: 1. The broker's signed entry in his book constitutes the contract. 2. The bought and sold notes do not constitute the contract. 3. But the bought and sold notes, if they show a complete contract, satisfy the statute of frauds. 4. Either note will satisfy the statute if there be no material variance between its entry and notes. 5. One note only being put in evidence, the defendant may put in the other note or the entry in the book to prove a variance. 6. If the bought and sold notes correspond, but they vary from the entry, it becomes a question for the jury to say whether the acceptance of the notes, by the parties, constitutes evidence of a *new* contract. 7. The same rule governs where the bargain is by correspondence, and there is shown to be a variance between such agreement and the bought and sold notes; and 8. Where the bought and sold notes vary, and there is no signed entry in the broker's book nor other writing showing the terms of the bargain, there is no valid contract.

¹ First National Bank of Springfield *v.* Dana, 79 N. Y., 109; Low *v.* Hall, 47 id., 104; Thomas *v.* Lumley, 50 How. Pr., 108; Cook *v.* New York Central R. R. Co., 3 Keyes, 476; Scofield *v.* Hernandez, 47 N. Y., 313; Labor *v.* Koflin, 4 N. Y., 547; Dickenson *v.* Silwot, 1 Stark., 128; 2 id., 57; Grant *v.* Fletcher, 5 B. & C., 436; Gale *v.* Wells, 1 C. & P., 388; 12 C. L. R.,

230; Goom *v.* Afflalo, 6 B. & C., 117; Trueman *v.* Loder, 11 A. & E., 589; 39 C. L. R., 319. The broker's authority may be revoked at any time before he has signed the note in behalf of the party revoking. Warwick *v.* Slade, 3 Camp., 127. As to a material alteration of a note, see Mollett *v.* Wackerbarth, 5 C. B., 181.

² §§ 294-301.

CHAPTER XXV.

OF AUCTION SALES AND AUCTIONEERS.

- § 515. Origin and meaning of the word auction.
- 516. What is an auctioneer.
- 517. Statute of certain states as to auction sales; agency of auctioneer.
- 518. As to such sales being within the statute of frauds.
- 519. Same subject; description of an auction; *Davis v. Robertson*.
- 520. Early Massachusetts case on auction sales.
- 521. Auction sales within the statute of frauds; *Hicks v. Whitmore*.
- 522. The auctioneer as an agent.
- 523. Memorandum to be made by the auctioneer.
- 524. The auctioneer's memorandum in his sale-book must contain all the essentials under the statute.
- 525. A clear designation of the bidder is sufficient identification, although his name be incorrectly written.
- 526. Where must the memorandum be made; construction of the statute; opinion of Chief Justice Savage.
- 527. Auctioneers are liable for gross negligence in the performance of their duties.
- 528. Auctioneer must make the entry in his sale-book *at the time* of the sale, *eo instanti*; *Craig v. Godfrey*.
- 529. A sale by sample must be so entered by the auctioneer.
- 530. Reason why the entry must be made *at the time* of the sale.
- 531. The words "at the time" are strictly construed.
- 532. Interpretation of the rule; *Smith v. Arnold*.
- 533. The same subject continued.
- 534. When the vendee will not be bound.
- 535. Auctioneer's clerk may sign memorandum and bind the parties.
- 536. Example; *Johnson v. Buck*.
- 537. Clerk to call out the name of purchaser.
- 538. Where a sale extends over a day, entry under same caption sufficient; *Price v. Durin*.
- 539. Auctioneer may maintain an action; clerk deemed the agent of the buyer.
- 540. Possession and interest of auctioneer and as agent.
- 541. Each parcel bought at an auction, a separate contract, except in certain cases.
- 542. Example where several parcels were bought; *Mills v. Hunt*.

- § 543. As to description designating the seller.
544. The word "Do." underneath the name of a buyer, held not a sufficient description.
545. Where the memorandum is deficient in not naming the vendor, his subsequent letters sufficient to bind the contract.
546. Of an undisclosed principal in an auction sale.
547. Where the auctioneer enters his own name, without any reference as to agency.
548. Where auctioneer omits to enter name of buyer, he is liable in damages; *Townsend v. Van Tassel*.
549. Of conditions and particulars of terms in auction sales.
550. Example; condition as to retraction of bid.
551. Another example; indorsed notes; *Webster v. Hoban*.
552. Where conditions of sale are posted on the walls of the auction room, entry must refer to conditions.
553. Another example; *Pierce v. Corf*.
554. Sale avoided where two persons agree not to bid against each other.
555. Where property bought "on joint account;" *Parsons v. Phelan*.
556. By-bidding against public policy; bidder not bound.
557. Employment of a bidder may be in good faith to prevent sacrifice of property, but the intention should be announced.
558. An auction implies that goods shall be struck off to the highest real bidder, then every person stands on common ground; *Steele v. Ellmaker*; false description of goods.
559. The same rule of good faith applies equally to the fourth as to the seventeenth section; underbidding vitiates the sale.
560. Of puffers; *National Bank of Metropolis v. Sprague*; where a real bid intervenes, sale held valid.
561. Sale void where a puffer is employed; *Fisher v. Hersey*.
562. An auction sale "without reserve" and "positive" sales, law of.
563. A sale of stolen goods at auction passes no title; auctioneer liable; *Hoffman v. Carow*.
564. When may an auctioneer decline to receive a bid.
565. An action for damages will not lie for expenses and loss of time incurred by a person, where goods are advertised for sale by auction, and afterwards withdrawn by the auctioneer; *Harris v. Nickerson*.
566. A court of equity will relieve a purchaser in certain cases.

§ 515. The ordinary meaning of an auction is a public sale by an authorized auctioneer of property to the highest bidder.

The word auction, as well as the mode of sale itself, is of

Roman origin. It is called *sub hasta* in some old books, from the fact that in early times auction sales were of the spoils taken in war, and a spear was erected as the signal of the sale by auction.

The Dutch custom of beginning at a high price and gradually reducing it until some one closes with the offer, in sales at auction, makes a binding contract if conducted in good faith.

In general, the term sale is of legal import, whether applied to an auction or a private sale. Each alike is founded upon mutuality of obligation.

In attendance at auction sales there are, ordinarily, the owner of the goods to be sold; the auctioneer; and highest bidder, together with the portion of the public attending at the sale.

An auction has not inaptly been called *locus penitentiae*.

§ 516. An auctioneer, according to the ordinary acceptance of the term, is a person authorized to conduct a public sale of property by auction for a commission on the proceeds of the sale.

He is authorized only to sell.

He is not *ex vi termini* agent of both parties.

He is, primarily, the agent of the seller; but upon a bargain being struck, he becomes the agent of the buyer as well.¹

In some respects he is like a factor, but differs in this, that the law imposes the payment of a duty upon him as well as the credit, in case of a delivery, without the recompense of a commission *del credere*.

§ 517. The statute of frauds of New York, Minnesota, Nevada, Wisconsin, and the territories of Arizona, Dakota

¹See Revised Statutes of New York of 1813; *Hicks v. Minturn*, 19 Wend., 550; *Brown v. Cheeney*, 38 How. (N. Y.), 352, 359; *Minturn v. Main*, 7 N. Y., 220; affg. S. C., 3 Sandf., 50, *sub nom.* *Minturn v. Allen*. In early times auctioneers were called brokers. Spelman in his Glossary, *Auctionarii*, defines them thus: *Qui publicis subhastationibus præsunt, Propolæ, et quos, Angli, Brokers, dicimus.* See, also, *Goshen v. Kern*, 63 Ind., 473.

and Montana, contain a specific provision regulating sales by auction, in the following language:

"Whenever goods shall be sold at auction, and the auctioneer shall at the time of the sale enter in a sale-book a memorandum specifying the nature and price of the property sold, the terms of the sale, the name of the purchaser, and the name of the person on whose account the sale is made, such memorandum shall be deemed a note of the contract of sale within the meaning of the statute of frauds."¹

Before this enactment in those states considerable difference of authority existed as to the particular memorandum required in such sales, and thereby the legislature redeemed the law from a perplexing uncertainty.

For a generation, however, before these enactments, and in states where no similar law existed, a sedulous compliance with the statute of frauds in auction sales was required.

When the above requisitions are complied with the agency of the auctioneer arises so far as to enable him to bind the parties. Such agency, however, ceases immediately after the completion of the sale.

The memorandum must be made by a person not directly interested in the sale — a third person — a person thereunto lawfully authorized.²

§ 518. In some of the early English cases, doubts were entertained by the judges whether sales by auction were embraced within the meaning of the statute of frauds. The grounds were, *first*, that the solemnity of the sale precluded the possibility of perjury as to the fact of sale; and *second*,

¹ R. S. of New York, § 4, ch. VII, tit. II, pt. II; Nevada Gen. Stat., § 2632. In Michigan, California, Oregon, Colorado, Dakota, Nebraska, Idaho, the memorandum of the auctioneer giving the terms and conditions of sale satisfies the statute of frauds.

² *Horton v. McCarty*, 53 Me., 398. The Code of Georgia, § 2630, reads as follows: "In case of sales by auction the auctioneer shall be considered agent of both parties, so far as to dispense with any further memorandum in writing than his own entries."

that the statute was only meant to extend to the mischiefs created by private or clandestine sales.¹

But Lord Ellenborough's direct and conclusive answers to these objections in *Hinde v. Whitehouse*² seem satisfactory, and clearly show that auction sales ought to and do fall within the statute. He did not think the express requisition of a memorandum in writing should be dispensed with, merely because the quantum of parol evidence in such sales is likely to render the danger of perjury less considerable.

The policy of that decision has uniformly been followed in England.

And in this country, since the strong *dictum* of Chief Justice Savage, in *Hicks v. Whitmore*,³ auction sales have been held to be within the statute of frauds.

A review of the cases will show the different phases and lights in which the several questions have arisen.

§ 519. In South Carolina, in 1817, although by a divided court, in *Davis v. Robertson*,⁴ it was decided that the statute of frauds embraced contracts for the sale of goods, wares and merchandise by auction.

The sale there was of a lot of cotton. The decision is contradictory of the early cases referred to.

There Nott, J., said: "The persons present frequently constitute a tumultuous crowd; the sales are generally conducted in a manner that affords the least possible opportunity for deliberation; the crier passes rapidly from one article to another; no person present takes an interest in anything except what regards himself, and that no longer than while the article is immediately under the hammer; and, although five hundred might be present, one, probably,

¹ *Simon v. Metevier*, 1 W. Bl., 601. *Knox v. King*, 36 Ala., 367; *White v. Crew*, 16 Ga., 421; *Ennis v. Wal-*

² 7 East, 568; *Blagden v. Brad-*
bear, 12 Ves., 472; *Walker v. Con-*
stable, 1 Bos. & Pul., 306; *Buck-*
master v. Harrop, 13 Ves., 456. *Iowa*, 93.

⁴ *Mills' R.*, 31.

³ 12 Wend., 548 (1834). See, also,

could not be found, not even the auctioneer himself, who could recollect the price or purchaser of any particular article two hours after it was knocked off."

This is a clear statement of the manner and course of an auction sale.

Colcock, J., took the opposite view.

The case serves to show the conflict of opinion which existed at that time.

§ 520. So in an early Massachusetts case, where a vessel was sold at auction by the defendant to the plaintiff, and the auctioneer omitted to make a note or memorandum in writing of the sale, the court declared the sale to be void for that reason.¹

The learned Parker, C. J., there observed, that while doubts had been entertained by great men in England whether the statute of frauds included sales by auction, equally great men, he said, had questioned the reasonableness of those doubts; and thus he deemed himself at liberty to decide according to his own views, and said: "We are of opinion that it does apply to sales by auction."

The reason given by Lord Mansfield, that the solemnity of such sales precludes the danger of perjury, *he did not think satisfactory*. He thought "there was *more* danger of mistake and perjury where there are so many witnesses, than where there is only one or two."

§ 521. In the well considered case of *Hicks v. Whitmore*,² it was held that the statute in relation to auction sales was made in reference to the law as it then existed. It was intended to remove all doubts as to the contents of the memorandum, and the manner of making it.

The statute is very clear. It declares that every contract for the sale of goods, etc., for the price of \$50 or more, shall be void, unless a note or memorandum of such contract be made in writing, and subscribed by the parties to be charged thereby. It must contain "the name of the per-

¹*Davis v. Rowell*, 2 Pick., 65 (1823). ²12 Wend., 552.

son on whose account the sale is made," etc., or there is no binding contract.

Savage, C. J., says: "From the phraseology used, I infer that the legislature intended it should not be necessary to insert the name of the real owner, but that it should be sufficient to insert the name of any person having legal authority to sell." This is a reasonable construction. Hence, the statute of frauds is complied with if the auctioneer insert in his sale-book the name of the agent, factor, consignee, or any person having the legal right to sell, that is, the name of the person on whose account the sale is made. Nor is it necessary that the action should be brought by the same person on whose account, as appears from the memorandum, the sale is made. The real owner may bring the suit, notwithstanding the sale was made through an auctioneer, agent or factor.

So the auctioneer may ordinarily maintain an action for the price, or for the property sold. This doctrine rests upon the right of the auctioneer to receive, and his responsibility to his principal for, the price, and his lien thereon for his commissions, for which he has a special property in the goods.

§ 522. The auctioneer, who writes in his sale-book the article sold, the price, and the name of the buyer, is *quoad hoc* the buyer's agent. But he must at the same time enter the name of the person on whose account the sale is made, otherwise the vendor is not bound.¹

It may be urged, said the court, in an early case in Maine, that the auctioneer, who is directly employed and deputed to act for the seller, ought in no case to be regarded as the agent of the purchaser. "If this were *res integra*," said the court, "strong reasons might be and have been offered in support of this position."²

¹ 10 Alb. Law Journal, 27. The agency of the auctioneer exists only at the time of the sale, and he cannot, at a subsequent day, bind the parties by his signature. *Mews v. Carr*, 1 H. & N., 484.

² *Cleaves v. Foss*, 4 Greenl. R., 9.

The question: "By what authority does the auctioneer write down the purchaser's name?" The answer: "By the authority of the purchaser." Persons bid, and announce their biddings loudly and particularly enough to be heard by the auctioneer.¹ And this is done that he may write down their names opposite the lots sold. Therefore he writes the name by the authority of the buyer, whose agent he becomes, it is said, upon knocking down the hammer upon a *bona fide* bid.

§ 523. As it takes two to make a bargain, it is necessary that the memorandum show who are the contracting parties. This may appear by description. But if only one party is mentioned, by name or description, the statute is not satisfied.

This rule applies equally to sales by auction as to sales in any other mode.

If the memorandum shows by *description* with whom the bargain was made, the statute of frauds is satisfied and parol evidence is admissible to apply the description; not to show with whom the bargain is made, but to show who is the person described, so as to enable the court to understand the description. Nor is this rule any infringement of the statute, for in all cases where written evidence is required there may be parol evidence to apply the document to the subject in controversy.

There are many authorities and cases sustaining this doctrine.²

If the auctioneer omit to sign the memorandum which he has made, it will not be sufficient to satisfy the statute of frauds.³

¹ *Emmerson v. Heelis*, 2 Taunt., 38, Mansfield, C. J. *Mfg. Co. v. Stoddard*, 14 How. (U. S.), 446; *Coate v. Terry*, 24 U. C. C.

² 2 Smith's Leading Cases, 349, note; *Williams v. Bacon*, 2 Gray, 387; *Sanborn v. Flagler*, 9 Allen, 477; *Dykers & Alstyne v. Townsend*, 24 N. Y., 57; *Salmon Falls* P., 571; Benjamin on Sales, sec. 237.

³ *Rafferty v. Lougee*, 63 N. H., 54.

• § 524. In *Singstack v. Harding*,¹ Nicholson, J., in effect says the uniform current of decisions has been that, the auctioneer having entered the purchaser's name in the auction sale-book as the purchaser, such an entry was a sufficient memorandum in writing of the contract in the sale of chattels to gratify the requisition of the statute of frauds; and that the statute makes no distinction between a memorandum in writing for the sale of the chattels and the sale of lands.

And further: "The rule which seems to be adopted as to the contents of the memorandum is this: that the memorandum must contain everything that is necessary to show the contract between the parties, so that no parol evidence shall be necessary to explain the intention of the parties or the terms of the agreement."²

§ 525. In *Fessenden v. Mussey*³ the plaintiff sought in an action in *assumpsit* to recover the price of a pew sold at auction.

On the trial a book was offered in evidence containing the following entry:

Sale of pew in B. St. Ch., for account S. F., Monday, March 24,	
'45, Pew No. 18, B. M.....	\$112 50
Charges, advertising and commissions.....	5 00

On appeal it was held that, if this entry was made by the auctioneer, or by his clerk under his direction, *at the time and place of sale*, it was enough to take the case out of the statute of frauds.

The entry designated what was sold, by and to whom, the time and place, and although the defendant's middle name was omitted, it was held competent to show that he was known by the name used, or that he subsequently recognized it as his, and as to the terms of sale, the presumption is it was for cash.

¹ 4 H. & J. (Md.), 192; *First Baptist Church of Ithaca v. Bigelow*, 16 Wend., 31. on Sales, 14; *McComb v. Wright*, 4 Johns. Ch., 659; *Payne v. Cave*, 3 T. R., 148.

² Story on Agency, 27; *Campbell* ³ 11 Cush. R., 127.

In general it is held that a contract for the sale of a pew in a church falls within the operation of the statute of frauds.¹

§ 526. The able and luminous opinion of Chief Justice Savage,² in *Hicks v. Whitmore*, in construing the clause of the statute as to auction sales, enunciated the true doctrine and settled the law in this country on that subject. There, an action was brought to recover the difference between the first and second sales of a vessel sold by auction. One of the conditions of the sale was approved indorsed notes at six months. The vessel was struck off to the defendant at the first sale for \$3,150, and was resold, as alleged, by reason of non-compliance with the said condition, for \$2,550. The vessel was first sold at the Merchants' Exchange in New York, December 18, 1830.

The auctioneer wrote down on a piece of paper, at the time, in pencil, the name of the highest bidder, and the price; but he did not write down the names of the owners, nor the "person on whose account" the vessel was sold. The memorandum read: "December 18, 1830, W. W. & E. Thompson, selling the brig Anna Maria to Swanton Whitmore, for \$3,150, terms, approved indorsed notes at six months, \$10."

The auctioneer testified that the vessel was put up for sale at 2 o'clock, P. M.; that he was from fifteen to twenty minutes in making the sale, and went immediately to his counting-house in Wall street, near Pearl, and there made the entry in his book; that he had no doubt it was made

¹ *Freeport v. Bartol*, 3 Greenl., 340. As to cases touching the sale of church pews, see 1 Washb. Real Prop., 31; *Daniel v. Wood*, 1 Pick., 102; *Cox v. Baker*, 17 Mass., 438; *Church v. Wells*, 24 Pa. St., 249.

² 12 Wendell (N. Y.) R., 548 (1834). As Lord Ellenborough's strong *dicta* in *Hinde v. Whitehouse* (7 East, 558) settled the law as to sales of goods by auction be-

ing within the statute of frauds (in 1806) in England, so Chief Justice Savage settled that law in this country. In *Hinde v. Whitehouse*, the buyer signed his name in the catalogue opposite the lots knocked off to him, and the sale was subject to conditions which were not mentioned in the catalogue, not annexed to it. *Held*, that this was not a sufficient memorandum.

before 3 o'clock. A day or two after the sale, the defendant called upon him and offered to procure the name of "N. L. & Co." as indorsers to his paper. He communicated the fact to the owners of the vessel, but they were not satisfied. Several days thereafter he told the defendant the paper was not satisfactory, to which the defendant answered that he could give no other.

On December 28, the auctioneer informed the defendant that unless he complied with the terms of sale before 5 o'clock of that day, the brig would be advertised, and sold at public auction on the 31st of the month, at 2 o'clock, at the Merchants' Exchange, *on his account*, and would hold him liable for any deficiency, and account to him for any surplus. The vessel was sold accordingly, and brought \$2,550.

On the day of the sale, the defendant wrote to the auctioneer that he had fully performed his contract; that after the refusal to deliver the vessel to him, he did not consider himself "in the least degree interested in the vessel or the proceeds."

The auctioneer did not know Robert T. Hicks, nor George Maxwell, who were joined as plaintiffs with W. W. and E. Thompson; he was employed by the Messrs. Thompson to sell the vessel, and their firm consisted only of themselves.

It was shown that the vessel belonged to the plaintiffs.

A nonsuit was asked for on the ground that the memorandum was not in accordance with the statute of frauds.

The testimony tended to show that the credit of "N. L. & Co." was good; but the jury found for the plaintiffs in the sum of \$670. After citing the section of the statute of frauds as to auction sales, and stating that it had never before been passed upon, Savage, C. J., says: "The statute was no doubt made in reference to the law as it existed at the time, and was intended to remove all doubt or uncertainty, if any existed, as to the contents of the memorandum."

It will be observed that it is not the name of the vendor or owner that the statute requires, but the name of the person on whose account the sale is made, which "may well be complied with by inserting the name of the agent, factor or consignee."

As to the insufficiency of the writing as a memorandum he observes: "The memorandum made in pencil was clearly not a compliance with the statute, because *it was not made in the sale-book*. The statute says that certain contracts by parol shall be void, unless certain things are done. It is not enough that a memorandum is made, but it must be made in the sale-book of the auctioneer, not in any other book, his day-book or his ledger as such, but a book in which he enters his transactions of sales. I do not mean to say that he may not make his day-book his sale-book, but the legislature evidently intended that the auctioneer should keep a book called a sale-book, which should contain an entry of his sales."

§ 527. Sales by auction not made in sedulous compliance with the statute of frauds are void.

The action of *Hicks v. Minturn*¹ was brought to hold the auctioneer liable for negligence in omitting to conduct the auction sale of a vessel in conformity with the statute.

These plaintiffs had brought an action against the purchaser, and were nonsuited;² and now sought to recover the difference between the first and second sales, and the costs incurred in the suit against Whitmore. The manner of the sale and the facts and circumstances attending it are given in the preceding section (526), and therefore it will not be necessary to restate them here.

The court, Nelson, Ch. J., held that the plaintiffs in this case must rely upon the implied contract, arising out of the employment of the defendant in his professional character, and that this could not extend beyond the duties imposed by reason of such employment. That like other professional men or agents, auctioneers assume upon themselves

¹ 19 Wend., 550 (1838).

² 12 Wend., 548.

an obligation to their employers to perform the service confided to them with ordinary care and skill, and become responsible in default of either; in other words, "they are responsible for loss arising from gross negligence or ignorance."

The court decided that the auctioneer was not liable, because it cannot be maintained that the omission to comply with the terms of the statute afforded conclusive evidence of gross negligence or ignorance, and for which a verdict should have been directed for the plaintiff.

The act had never been under the observation of the court, and its meaning in respect to the point wherein the defendant erred, presented a case for construction about which the legal profession might well differ, and where, of course, it would be most unjust to hold that a layman must decide correctly at his peril.

The judgment in favor of the defendant was affirmed.

Lord Ellenborough, in *Derew v. Daverill*,¹ said in a similar case: "I pay an auctioneer as I do any other professional man, for the exercise of skill on my behalf, which I do not possess; and I have the right to the exercise of such skill as is ordinarily possessed by men of that profession or business."

§ 528. The California case of *Craig v. Godfrey*² also presents the question of the sufficiency of an auctioneer's memorandum. There, the statute of frauds, like that of New York, requires the auctioneer to make a specific memorandum *at the time* of the sale.

The auctioneer omitted to write in his sale-book the *name* of the person on whose account the sale was made, and did not do so until the evening of the day of the sale. The court, Hastings, C. J., held that the memorandum was *insufficient*. This objection is not merely technical. The memorandum of an auctioneer must be as comprehensive as

¹ 3 Camp., 452.

² 1 California R., 415; 54 Am. Dec., 299, n.

the memorandum of other contracts under the statute of frauds.

He is agent of both parties immediately upon the consummation of the sale, not afterwards.

As the contract in this case was not in fact signed by the auctioneer, as agent of the defendant, until several hours after the sale, he possessed no authority whatever to sign when he did, by reason of this lapse of time. The auctioneer's agency only attaches immediately after the sale.

It was contended that as a day is to be considered a point of time, therefore if the memorandum was written during *the day*, it was made at the time of the sale. But the court, following the line of reasoning in the case of *The People ex rel. Campbell v. Clark*,¹ held that "a day is not to be considered a unit, to the prejudice of the rights of a party," and that an examination should be had of *the very point of time when an act is done, as the approval of an act of the legislature by the executive*.

The rule here enunciated is in accordance with the well-considered decisions and is sound law. Respecting the making of such a memorandum, the law takes notice of fractions of a day.

In *Hicks v. Whitmore*,² on a precisely similar point, the supreme court held that a memorandum entered by an auctioneer in his sale-book, in the name of the person on whose account the sale was made, only *one hour* after the sale, was insufficient under the statute of frauds to bind the vendor.

§ 529. It is well settled that an auctioneer is required to enter in his sale-book the particulars of the sale, whether by *sample*, or otherwise.

Thus it was held in *McMullen v. Helberg*,³ where the defendant, at an auction sale, purchased certain lots of maize, the property of the plaintiff, the bulk of which was in store.

¹ 11 California R., 406; *Mews v. Carr*, 1 H. & N., 484.

² 12 Wendell R., 548. See Alb. Law Jour., vol. 10, p. 27.

³ 6 L. R. Jr., 463.

In an action for not removing the maize within the time mentioned in the conditions of sale, and to recover the loss upon a resale, the plaintiff and the auctioneer testified that the sale was by *sample*; and it appeared that samples had been exhibited at the auction; but the entry in the auctioneer's book of the sales to the defendant did not state that fact. The court held that the sale having been by sample, the entry in the auctioneer's book omitted a material term of the contract, and that the memorandum was not sufficient within the meaning of the statute of frauds.

When goods are sold by sample, evidence of a custom of trade as to returning or making an allowance for such of the goods as do not answer the sample is competent and receivable.¹ But there is no implied condition at law that the purchaser on a sale of goods by auction has a right to inspect and measure the goods.²

"The memorandum," says the court, "must not only be made in the sale-book, but must be made at the time of the sale. If these words are taken literally, they are perfectly clear and intelligible; but if it be said that the time of sale means one hour after the sale, we shall find ourselves legislating, and appointing a different time from that mentioned by the legislature."

An entry made in pencil is as valid as if made in ink, but it must be done before any other business engrosses the auctioneer's attention; i. e., immediately upon the completion of the sale, when no occurrence shall have happened to obliterate it from his memory.

The court held that the memorandum was not in compliance with the statute, and a judgment of *nonsuit* was entered.

§ 530. It was held by Chief Justice Oakley, in *Goelet v. Cowdrey*,³ that the meaning of the section [four] as to sales

¹ *Cooke v. Reddelien*, 1 Car. & K., 561.

³ 1 Duer (N. Y. Supreme Court), R., 140.

² *Pettitt v. Mitchell*, 4 Man. & G., 819.

of goods by auction, taken in connection with the preceding section, requiring a written memorandum of the bargain, evidently is, that every such sale (where the price exceeds the sum mentioned in the statute) shall be void, unless the goods are immediately paid for, or delivered in whole or in part; or, unless the *requisite memorandum* is made *at the time* of the sale. Otherwise a defective memorandum, for example, one not made *at the time*, might be admitted as evidence of a valid sale; and this would, so far as the power of the court extends, be a virtual repeal of the law.¹ From the decisions the necessary sequence follows, that the moment the auctioneer violates any provision of the statute in this regard, that moment his agency ceases.

An auctioneer possesses no authority whatever to bind either party to any contract, except in the manner prescribed by the statute. The general law of agency applies in such sales. In case of private sales by an auctioneer, it has been held that he is solely the agent of the vendor, and in no sense the agent of the vendee; and so it was held in the court of exchequer.²

§ 531. The decisions are also consistent in this, that the memorandum must be made by the auctioneer in his sale-book *at the time* of the sale. It must be done *eo instanti*—simultaneously. This requirement is strictly construed. While the rule may seem somewhat rigid, it accords with the policy of the law. It accords likewise with the intention of the legislature, and that is the golden rule of construction of all statutes.

Hence the conclusion that the memorandum of an auctioneer, required by the statute of frauds, must not be left to memory; it must be the immediate record of the facts by him, made at the time when they occur.

The price, and the name of the vendor, must in terms appear.

¹ *Horton v. McCarty*, 53 Me., 394; *Flintoft v. Elmore*, 18 U. C. C. P., O'Donnell *v. Leeman*, 43 id., 158; 274.

Smith v. Arnold, 5 Mason, 414; ² *Mews v. Carr*, 1 H. & N., 484; 26 L. J. Ex., 39.

These rules have been adhered to since Chief Justice Savage's strong *dicta* in *Hicks v. Whitmore*¹ in 1834. That was the first adjudication in New York upon the section of this statute. The purport and meaning of which enactment would seem to be, that an auctioneer is the agent of both buyer and seller, upon his writing down the purchaser's name in his sale-book, immediately upon striking off the property.²

Such memorandum of the auctioneer must contain all the particulars of the terms of sale. The evident intention of the legislature being that nothing should be left to inference, memory, presumption or parol proof.

And fractions of a day are regarded as material; delay is fatal to the validity of the contract.³

§ 532. Hence, in *Smith v. Arnold*,⁴ as a reason why the law imposes the qualification that the memorandum of the auctioneer, in order to bind the *purchaser*, must be *contemporaneous* with the sale, and not made afterwards, says Mr. Justice Story in effect, is to prevent men from being ensnared by contracts subsequently reduced to writing by agents; and also the further reason, that, in case of any dispute, "the auctioneer would naturally incline to the side of his employer, against the person with whom he has no other relation than that of a bidder for the property which he, as agent for the owner, has offered at public sale."

He also substantially said that the auctioneer is the agent of the seller, but it is not so clear that he is agent of the buyer; and that such conclusion is "founded on somewhat artificial reasoning."

But nevertheless the doctrine seems to be established

¹ 12 Wend., 548; *Morton v. Dean*, Barn. & Adol., 446; *Rennys v.*
13 Met., 385; *Briggs v. Munchon*, Proctor, 3 Ves. & B., 57.

56 Mo., 467; *Walker v. Hening*, 21 ³ *Craig v. Godfrey*, 1 Cal., 415;
Gratt., 678; *Gill v. Hewitt*, 7 Bush, *Metts v. Bright*, 32 Am. Dec., 683;
10; *Fessenden v. Mussey*, 11 Cush., *Murfree v. Carmack*, 26 id., 232;
127. *Williamson v. Farrow*, 21 id., 492.

² *Heideman v. Wolfstein*, 12 ⁴ *Mason, C. C. R.*, 414.
Mo. App., 368; *Bird v. Boulton*, 4

upon the theory that an auctioneer is deemed a disinterested person.

§ 533. Mr. Wood, in his valuable work on frauds, says that an auctioneer is the agent of the vendor alone until the bid is knocked off, when he becomes also the agent of the vendee, for the purpose of perfecting the sale, and it is upon the ground of this dual capacity that *his memorandum of a sale, made by him at the time thereof, and before this agency ceases, is binding upon both*. This rule extends only to third persons, acting as auctioneers, and where a party acts for himself, or his agent.¹

§ 534. If the owner of the property sold at auction be himself the auctioneer, he cannot bind the vendee by his memorandum, as he is not, in the language of the statute of frauds, a person thereunto lawfully authorized.

The provision of the statute of frauds requiring the memorandum to be signed by some person thereunto lawfully authorized, meaning a third person, is based upon sound commercial reasons, for the seller is *thereby prevented from fastening his own terms of sale upon the buyer*. Otherwise the door to possible fraud would be thrown wide open, and the very mischief prevail which the statute intends to guard against.²

§ 535. In *Frost v. Hill*,³ however, the court held that a memorandum of the goods sold and the prices bidden for them, made by the clerk of the vendor who sells goods at auction, was sufficient under the statute to bind the vendee. In such case he is, *pro hac vice*, the auctioneer's clerk, and agent of the buyer upon a bargain being struck.

But in *Tull v. David*,⁴ where a trustee, who, at an auction sale, under a deed of trust, acted as his own auctioneer, it was decided that he could not bind the purchaser by a memorandum of the sale signed by himself.

¹ Wood on Frauds, 726.

³ 3 Wendell (N. Y.) R., 386.

² *Smith v. Arnold*, 5 Mason, 417;
Bent v. Cobb, 9 Gray (Mass.), 397;
Wright v. Dannot, 2 Camp., 203.

⁴ 45 Missouri, 444.

In *Farebrother v. Simmons*¹ Mr. Chief Justice Abbott (afterwards Lord Tenterden) substantially held that the agent contemplated by the statute of frauds, who is to bind a defendant by his signature, must be a third person; not the other contracting party; and decided, where an auctioneer wrote down the defendant's name by his authority opposite to the total purchased, that in an action, brought in the name of the auctioneer, the entry in such book was not sufficient.

And in *Starman v. Brandt*² it was expressly decided that one of the parties to the contract cannot sign the name of the other, so as to bind him or constitute a contractual obligation.

§ 536. In an auction sale made in good faith it seems to be immaterial whether the purchaser's name is written in the sale-book by the auctioneer or by his clerk.

Depue, J., in the case of *Johnson & Miller v. Buck*,³ says that "when the bids are announced, and the property struck off, the clerk is the agent of both parties to record the sales and affix the signature of the purchasers, although he is employed to act as clerk by the auctioneer. No reason for his disability to act as agent for the purpose of making the signature of the purchaser, as between the latter and the auctioneer, can be adduced, which will not operate equally to exclude the auctioneer, where the litigation is directly between the vendor and purchaser."

The signature must in all cases be made by an agent lawfully authorized to make the same.

§ 537. In *Moss v. Cohen*⁴ an auctioneer employed his

¹ 5 Barn. & Ald., 333.

² L. R., 6 Q. B., 720; *Flintoft v. Elmore*, 18 U. C. C. P., 274.

³ 35 N. J., 342; 22 Am. Law Reg. N. S., 9; *Browne on Stat. of Fr.*, 369; *Fiske v. McGregory*, 34 N. H., 414; *Norris v. Blair*, 39 Ind., 90; *Butler v. Thomson*, 2 Otto, 412; *Morton v. Dean*, 13 Met., 385.

⁴ 3 Vict. L. R., 205; 3 Anst. Jur., 104; *Servier v. Walker*, 3 id., 182.

The signature of the clerk of an auctioneer on behalf of a purchaser is sufficient to charge the party purchasing, within the statute of frauds. *Clarkson v. Noble*, 2 Q. B. (Ontario), 361.

clerk, at a sale by auction, to act as amanuensis, by writing down in the sale-book the name of each person to whom the lots were respectively knocked down.

It was in that case held that, in order to comply with section 17 of the statute of frauds, the name of each purchaser should be *called out by the clerk before making the entry of the name in the sale-book*.

While the auctioneer may sign as agent for the purchaser, say some of the cases, his clerk has not the same authority. And yet it would seem that the auctioneer's clerk is merely an elongated pen used by the auctioneer.

§ 538. The plaintiff, in *Price v. Dunn*,¹ had an auction sale of boots and shoes, commencing on the 5th of April, continuing through the day, and extending over the next day, when the sale was closed.

One Jesse Butler was the auctioneer, and one Stitt, a clerk in the regular employ of the plaintiff, acted as clerk of the auctioneer. The memorandum of the sales was made by Stitt in a book owned by the plaintiff, but all the entries at the sale were made under the direction of the auctioneer.

The following caption, before the sale commenced, was written in the sale-book:

“APRIL 5, 1866.

“Memorandum of auction sale on account of Milton S. Price, of boots and shoes, commencing April 5, 1866. Terms, ninety days, bank note, approved paper, names of purchasers and lots struck off to each, as noted as hereafter following.

“JESSE BUTLER, Auctioneer,
“Per W. STITT, Clerk.”

Stitt, the clerk, at the time of each sale, in the presence and under the direction of the auctioneer, entered in the book, under the above memorandum, the name of each purchaser, the number and kind of goods sold, and the price of

¹56 Barbour (N. Y.), 647 (1868).

each lot. At the close of the first day's sale Stitt signed at the end: "Jesse Butler, auctioneer, per Stitt, clerk."

On the following day Stitt continued to enter, under the memorandum of the preceding day, the names of the purchasers, the amount and kind of goods sold, and the price of such goods to the respective purchasers.

Forty parcels were sold to the defendant on the second day. Each parcel was entered separately by Stitt, in the presence and under the direction of the auctioneer, as it was knocked off, by inserting the name of the defendant, the description of the parcel sold, and the price of the same; and at the end of the sale for that day the name of the auctioneer and of Stitt were subscribed at the end, as was done on the previous day.

The defendant claimed that the memorandum was insufficient on the ground that such memorandum should have been made as often as a parcel was sold. But the court, Foster, J., held that the entries made by Stitt at the close of the sale of each parcel, under the direction and in the presence of the auctioneer, was a sufficient compliance with the statute of frauds, and the sale was declared to be valid. The judgment was affirmed.

§ 539. If the entry of the sale at auction be made in the regular sale-book, in the sight and with the concurrence of the buyer, by the auctioneer's clerk, he is deemed so far the agent of the buyer as that the auctioneer may maintain an action thereon.

In *Hulse v. Young*,¹ where this point was directly involved, the court said: "there can be no doubt that the action will lie."

So it has been held that an auctioneer may maintain an action for goods sold and delivered against a buyer, though the sale was at the house of a third person and the goods were not known to be his property.²

¹ 16 Johns. (N. Y.), 1; *Norris v. Blair*, 39 Ind., 90; *Fiske v. McGregory*, 34 N. H., 414; *Gerard v. Taggart*, 5 Serg. & R., 29. ² *Robinson v. Rutter*, 4 E. & B., 954; 24 L. J. Q. B., 250; *Chitty on Cont.*, 185.

§ 540. An auctioneer has a possession, *coupled with an interest*, in goods which he is employed to sell,—not a bare custody like a servant or shopman.

It was observed by the court in *Williams v. Millington*,¹ that the case of *Simon v. Metevier*² proved that an auctioneer was only the channel through which the contract was made between the buyer and seller; but this must be taken *secundum subjectam materiem*; though he is an agent to some purposes, he is not so to all; he is an agent for each party in different things, but not in the same thing; *when he prescribes the rules of bidding, and the terms of the sale, he is the agent for the seller, but when he puts down the name of the buyer he is agent for him only.*

While, under certain conditions and circumstances, the auctioneer is the agent duly authorized to sign a contract for the buyer, it is held otherwise in cases where the auctioneer himself brings the action.

And as has already been shown, the sale by auction is consummated when the hammer falls with the bidder's assent, and the auctioneer makes the requisite memorandum, provided the sale has been fairly and honestly conducted.

§ 541. If several distinct parcels or lots are bought at an auction sale, each parcel or lot is ordinarily deemed a separate contract; but, if the aggregate price of the purchases reaches or exceeds the sum mentioned in the statute of frauds, it is an entire contract and falls within its operation.

Thus, in *Jenness v. Wendell*,³ where certain household

¹ 11 H. Bl., 81; *Batturs v. Sellers*, 5 Harr. & J., 117; *Stoddard v. Vestry*, 2 Gill & John., 227.

² 1 W. Bl., 599.

³ 51 N. H., 63; *Wells v. Day*, 124 Mass., 38; *Rugg v. Minitt*, 11 East, 218; *Roots v. Lord Dormer*, 4 B. & Ad., 77; *Benjamin on Sales*, sec. 136; *Hausman v. Nye*, 62 Ind., 485; *Coffman v. Hampton*, 2 Watts & S., 377. This general doctrine was also adhered to in *Baldehy v. Parker*, 2 Barn. & Cres., 37; in that case, *Holroyd, J.*, observes that, at first, it appeared to have been a contract for goods of less value than £10, but, in the course of the dealing, it grew to a contract of a much larger amount; at last, therefore, it was one entire contract, within

furniture, farming utensils and tools were sold at auction, the court expressed the opinion that there existed very little difference, ordinarily, between a sale at auction and a sale contracted in any other way, of several articles at an agreed price, which are all put together in one account. The statute applies, if in the result it turns out that the amount reaches or exceeds the sum specified in the statute. Nor would this principle be changed if the sale were completed in one day, or extended over several days.

§ 542. The early case of *Mills v. Hunt*¹ disclosed the facts that Hunt bought at auction (Mills Brothers & Co. being the auctioneers) five parcels, described in the catalogue as 5, 31, 32, 33 and G. The goods were sold by sample. They belonged to persons other than the defendants, but the names of the *owners* were not disclosed at the sale, nor was it known that Mills Brothers & Co. acted as agents. At the trial, however, it appeared that they did so act, and that the goods were to be delivered and the bills collected by the owners of the goods.

The terms of the sale were approved indorsed paper at six months, for sums over \$100; under that sum cash, without discount.

A bill of the parcels purchased, amounting to \$224.40, was delivered to Hunt, who was directed to call on the owners for the goods. He called on the owners' agent and received all but parcel "G," and not receiving that he called on M. B. & Co. and tendered to a clerk in their employ, in the hearing of one of that firm, an indorsed note for the amount, payable in six months from the date of sale, telling the clerk at the same time that if the note was not ap-

the meaning and mischief of the statute of frauds. A somewhat different view seems to have been expressed at *nisi prius* in *Hodgson v. Le Bret*, 1 Camp., 233, by Lord Ellenborough, which case was referred to in *Baldey v. Parker*,

supra, and so far disregarded. The court held that a part delivery under the circumstances was sufficient, and affirmed the judgment. *Emmerson v. Heelis*, 2 Taunt., 38. See opinion of Best, J., page 45.

¹ 17 Wend., 334; 20 id., 431.

proved, he would pay the money, discount being deducted. The clerk answered that "he knew nothing," etc.

On the trial below the plaintiff (Hunt) proved the value of parcel "G" and rested.

Defendants moved for a nonsuit on the grounds: 1. That the contract was not binding within the statute of frauds. 2. That the tender of the note as made was not sufficient. 3. That the defendants were not the owners of the goods, but mere agents; and 4. That there was no proof of damage.

The judge, in refusing to nonsuit, held that the sale was entire; that the delivery of a part of the goods took the case out of the operation of the statute.

The jury rendered a verdict for the plaintiff, Hunt.

Nelson, Ch. J., delivered the opinion in the appellate court. He substantially held that Mills Brothers & Co. must be regarded as the owners of the goods for the purpose of deciding the question; for they so held themselves out by the catalogue, and nothing occurred at the sale to vary the legal effect of such conduct.

"Honest dealing requires the auctioneer to disclose in his catalogue, or otherwise, the names of his principals, if he does not intend to take their places in respect to the purchasers; otherwise he would be enabled to speculate upon them, by thrusting between him and them an irresponsible owner in every case of an unprofitable sale."

This principle is well settled by numerous authorities.

The question as to whether there had been such a partial delivery as to take the sale out of the statute was discussed, and the court held that there could be no doubt of the fact, whether the intent and understanding of the parties be regarded, or the meaning and policy of the statute of frauds.

He said: "Where the purchase is made at one time and from the same individual, however numerous the articles may be, the whole transaction should be deemed as constituting *an entire contract*, and the prices of the different articles fixed upon, as but *part and parcel* of it. To adopt any other construction of such a purchase would be a vir-

tual repeal of the statute for all useful or practical purposes, in a large amount of sales to which it has been understood as applying."

§ 543. There are some cases in the books, but not many, on the subject of sufficiency of description of the seller, as entered in the sale-book of the auctioneer.

The decisions, in interpreting the statute of frauds as to parties to the contract, hold that their description must be so clear that their identity cannot fairly be disputed.

Thus, in the case of *Sale v. Lambert*,¹ the particulars stated that the property was put up for sale by "the proprietor;" no further description was given in the conditions. The auctioneer signed a memorandum stating that "the vendor on his part shall in all respects fulfill the conditions of sale mentioned in the said particulars." The court held that the word "proprietor" was a sufficient description of the vendor within the statute of frauds.

In *Potter v. Duffield*,² however, where there was nothing to identify the seller except the signature of the auctioneer "on the part of the vendor;" and in another "vendors," the same judge who decided the case of *Sale v. Lambert*, *supra*, held that this description was not sufficient.

§ 544. Under a sale by auction the following signature was held insufficient.

The auctioneer had a book in which were entered the conditions of sale.³

Under these conditions in the book the auctioneer's name was written by himself; and underneath which were columns in which were entered the lots, the name of the buyers, and the prices paid for the goods. R., a buyer,

¹ 43 L. J. Ch., 470; L. R., 18 Eq., held sufficient, in *Catling v. King*.
1. See, also, *Rossiter v. Miller*, II. (appellant), 46 L. J. R. Ch., 384; L., 48 L. J. R. Ch., 10; L. R., 3 L. R., 5 Ch. Dec., 660.
App. Cas., 1124.

² 43 L. J. R. Ch., 472; L. R., 18 Eq., 4. The description "a trustee selling under power of sale" was
³ *Williams v. Ross*, 2 Wyatt & Webb's (Vict.) Law, 285. See, also, *Shiel v. Colonial Bank*, 1 Vict. R. (Eq.), 40.

bought several consecutive lots. In the line of the first lot bought by him was entered his name, "Ross," in the proper column; but in the lines of the next succeeding lots bought by him was entered simply the word "Do," in the proper column.

On a rule *nisi* to enter a nonsuit, on the ground that the signature by entry of "Do." underneath the name "Ross" in the column of buyers, it was explicitly held not a sufficient signature under the statute of frauds to bind the buyer as to the lots signed "Do."

§ 545. An omission of the auctioneer to enter the name both of the buyer and seller in his sale-book is not remedied by the fact that he makes a *partial* memorandum of the sale at the time.

But it was decided, in *Stammers v. O'Donohue*,¹ in Canada, where a fatal omission was made, that *subsequent writings* by the seller ratifying the sale satisfied the statute of frauds.

Thus, in that case (affirming the judgment of the court below, which affirmed the decree of the court of chancery² on the facts stated), it was held that, notwithstanding the vendor's name was not mentioned in the memorandum signed by the auctioneer, his subsequent letters and admissions were sufficient to render the contract binding.

This decision goes far beyond some well-considered cases, and may be questioned whether it is a reasonable construction of the statute. While the memorandum in respect to ordinary contracts is held to be good if signed by the party to be charged, and may be made up of different writings, in sales by auction the agency element is so important an ingredient as to require the strictest construction and proof.

The danger is, if too much latitude be allowed in such cases, that the very mischief which the statute aims to prevent may be augmented.

§ 546. If an auctioneer sells goods without disclosing the

¹ 8 App. R., 161, June Term, 1884; ² 28 Gr., 207; 1 Canadian L. T.,
4 Canadian L. T., 375. 128.

name of his principal, the character and extent of the contract he enters into with the purchaser depends upon the conditions of sale, and what is said by the auctioneer at the time. Thus, where an auctioneer sold by auction standing corn with the straw, for an unnamed principal, the price to be paid at once, and the crop to be removed immediately after it had arrived at maturity, at the purchaser's expense, it was held that it was a contract by the auctioneer to give the purchaser all proper authority to enter upon the land, and to cut and carry away the corn and straw, but that there was no actual warranty of the validity of the title of his principal to sell.¹

§ 547. In general, an auctioneer is personally liable as *vendor* unless he discloses the fact of his agency; and if he discloses the name of his principal, but signs a written contract in his individual name merely, which contract does not, upon its face, show that he was acting as the agent of another, he is still personally bound by the contract.

But in *Pinckney v. Hagadorn*,² where the entry was subscribed by the auctioneer in *his own name*, without any reference to his character as agent, and the question was raised whether that was a sufficient signing within the meaning of the statute of frauds, the court held that it was.

There Judge Sandford observed that the rule of law requiring an agent to sign the name of his principal in the execution of instruments is confined to writings under seal.

§ 548. An auctioneer is personally liable for any loss occurring by his dereliction of duty.

It is well settled that if through negligence an auctioneer omits to ascertain and write down the name of the bidder

¹ *Wood v. Baxter*, 49 L. T. Rep., 45. See, also, 29 Alb. L. Jour., 98. In *White v. Proctor*, 4 Taunt., 209, it is held that if the highest bidder be an agent, and his name be written down by the auctioneer, his principal is bound. See, also, *Chapman v. Partridge*, 5 Esp., 256; *Wright v. Dannat*, 2 Camp., 203; *Phillimore v. Berry*, 1 Camp., 513; *Clarkson v. Noble*, 2 U. C. Q. B., 361.

² 1 Duer (N. Y.) R., 95. See, also, *Evans v. Wills*, 22 Wend., 324; *Townsend v. Corning*, 23 id., 435; *Townsend v. Hubbard*, 4 Hill, 351.

upon the fall of the hammer, and the bidder, being a stranger to him, goes away, and the article is put up again and brings a less price, the owner is entitled to recover of the auctioneer the amount which was first bidden for the article.

Illustration: In *Townsend v. Van Tassel*¹ a horse was put up at auction and knocked down to a bidder for \$50. The auctioneer, through negligence, did not take the name of the person who bid, but merely called for the buyer to make a deposit. No person answered or appeared.

After the plaintiff had left, the auctioneer put up the horse again and sold it for \$37.50.

The general term, Daly, C. J., decided that it was the fault of the auctioneer that the person who bid \$50 was not ascertained and held to the sale. That it was the bounden duty of the auctioneer before proceeding any further to put up the horse again, so that those present might know immediately that no one having answered to the bid of \$50, the horse had not been sold, and that the bidding was still open. That the plaintiff under these facts was not bound to accept the reduced amount.

The judgment of the court below, dismissing the complaint, was reversed.

There are numerous cases sustaining the general view enunciated in the above case,² as also that the memorandum must be made immediately.

§ 549. Conditions or particulars, as they are sometimes called, of sales by auction, are the terms upon which the parties contract, and are binding if they are sufficiently made

¹ 8 Daly, C. C. P. R., 262.

² *Bent v. Cobb*, 9 Gray, 397; *Morton v. Dean*, 13 Met., 388; *Gordon v. Sims*, 2 McCord, Ch., 164; *Burke v. Haley*, 2 Gilm., 614; *Pike v. Balch*, 38 Me., 302, 311; *Horton v. McCarty*, 53 id., 394; *Harvey v. Stevens*, 43 Vt., 655; *Brent v. Green*,

6 Leigh, 16; *White v. Crew*, 16 Ga., 416; *Smith v. Arnold*, 5 Mason, 414; *Alna v. Plummer*, 4 Greenl., 258; *Linn Boyd Tobacco Warehouse Co. v. Terrill*, 13 Bush, 463; *3 Camp*, 452; *Flintoft v. Elmore*, 18 U. C. C. P., 274.

known to the bidder at the time of the sale. They should be clear and unambiguous.¹

It is not unusual for the seller of goods at auction to fix certain conditions both as to the terms and manner of sale; and these often involve questions more or less complicated.

Lord St. Leonards, in *Payne v. Cave*,² expressed the opinion that a condition to the effect that no person shall retract his bidding could not be enforced. He referred to the difficulty suggested by Baron Wood, in *Jones v. Nanney*,³ that the statute of frauds presents an obstacle which cannot be overcome by a condition of the sale or by agreement of the parties.

§ 550. One of the conditions in *Jones v. Nanney*⁴ was, that no person should retract his bidding "after it has been taken down and declared by the auctioneer." Another was, that the "purchaser shall pay to the auctioneer the duty granted to her majesty on the sale of real estate."

In that case it appears that after other biddings the defendant offered £4,000 for the property, which bid was taken down by the plaintiff, who was the auctioneer. At that point, before knocking down the hammer, he suspended the sale for a while, as he said, "to give gentlemen time to consider." In less than an hour afterwards he proceeded with the sale, commencing at the defendant's bid, at the same time stating that he would give "two minutes" more for gentlemen to consider, and if there was no advance over the

¹ *State v. Keeler*, 49 Mo., 548; *Rhodes v. Ibberton*, 4 DeG., M. & G., 787; *Symons v. James*, 1 Y. & C. C. C., 487; *Smith v. Ellis*, 14 Jur., 682; *Hoffman v. Anthony*, 6 R. I., 282.

² 3 Term R., 148; *Mesnard v. Aldridge*, 3 Esp. N. P. C., 271.

³ 13 Price R., 76. In England conditions like the following are sometimes made: "No person shall advance less than \$— at any bidding under \$—, no less than

\$— at any bidding over \$—, and no person shall retract his bidding." The authorities, however, are quite meager on the effect of such conditions. *Jones v. Nanney*, *supra*, presents this question in a qualified form. See, also, *Manser v. Buck*, 6 Hare, 443; *Byrne v. Van Tienhoven*, 5 C. P. D., 344; *Crottenkemper v. Achtermeyer*, 11 Bush (Ky.), 222.

⁴ 13 Price R., 148.

£4,000 bid, he would knock the property down to the defendant. The defendant at that point said, though the auctioneer (plaintiff) did not hear him, that he would not take the property.

There was no higher bidding and the property was struck off to the defendant, who refused to sign any agreement or complete the purchase.

The plaintiff (the auctioneer) having paid the crown duty brought this action to recover the same from the defendant.

To make the defendant liable, said Hallock B., you must show him to have been a purchaser, which you cannot do unless there was a sale for *all* purposes.

Alexander, C. B., said: "The question is not whether he (the defendant) may have behaved ill or not, but whether he was a *purchaser* of the lots put up and was bound to abide by his bidding. . . . If he was not bound by his bidding, he was not liable to pay the auction duty."

Hallock, B., further observed: "In point of fact, however, there was no contract of sale. Then why might not the defendant have retracted his bidding on the postponement of the auction?"

The court decided that the defendant was not liable. It would indeed be an evasion of the statute of frauds to hold that a bidder, as such, is a purchaser, even where his name is written down by the auctioneer before the striking down of the hammer; *or, even after the hammer falls*, unless with the bidder's consent.

It seems evident, said the court, from the frame of the condition, that the vendor did not consider the taking down of the bidder's name a signing within the meaning of the statute of frauds; otherwise a condition against retracting would have been useless.¹

Clearly, until the striking down of the hammer, and the writing down the bidder's name, with the bidder's consent,

¹ *Emmerson v. Heelis*, 2 Taunt., *self* which authorizes the auctioneer to write down the bidder's name. *White v. Proctor*, 4 Taunt., 209, seem to hold that it is the *bid* it-

as required by the statute, the sale is not consummated so as to constitute a contract enforceable by law.

§ 551. The early case of *Webster v. Hoban*¹ presented the question of conditions at an auction sale. There it was formally stated that "the purchaser should secure the purchase money, with interest, by his promissory notes, with two approved indorsers, payable in six and twelve months;" and that the purchaser "should be allowed thirty days to comply with these terms, at which time, in case of compliance, he was to receive a good and complete title to the property, and on failing to comply within the thirty days, the property was then to be resold on account of the first purchaser."

There was no resale, nor any deficiency shown as arising from a resale. The plaintiffs contended, however, that the remedy by a resale was merely cumulative, and did not take away the right of action against the defendant for his violation of the contract.

But Livingston, J., writing the opinion of the court, said: "Such is not the opinion of this court. The vendee, by the terms of sale, had an option of taking the estate after it was bid off to him, and, in case of refusal, of having it sold again on his account;" and affirmed the judgment.

It seems to be settled that parol evidence of declarations of an auctioneer, contradictory of the written terms of sale, ought not to be admitted; it might introduce great uncertainty, for instance as to titles derived under sales at auction.²

§ 552. Where horses were sold by auction, and the catalogue contained certain conditions as to (*inter alia*) warranty, and headed "special conditions of sale (in addition to those under which these sales are held)," and on the walls of the auction room large bills were posted, containing other conditions headed "conditions of sale," the court held that a purchaser of a horse at the sale must be bound by

¹ 7 Cranch R. (U. S.), 399 (1813).

² Lessee of *Wright v. Deklyne*,
1 Peters, C. C. R., 204.

the conditions on the walls, although it was not evidenced that he had seen them, other than as contained in the catalogue, and he maintained that the two sets of conditions were inconsistent.¹

Upon a sale by auction subject to *conditions* of sale, the auctioneer's entry in his book is void under the statute of frauds, unless the entry contains such reference to the conditions as to identify them upon production as being the conditions mentioned therein.²

§ 553. In *Peirce v. Corf*³ certain horses were sold at auction, in accordance with a catalogue, to which conditions of sale were annexed. A horse was put up for sale and knocked down to C., and the auctioneer's clerk at the time, signed, not the catalogue, but a ledger, in which the horse was specified, but not in the manner in which it was specified in the catalogue, nor did it refer to the conditions of the sale.

It was held that the plaintiff could not recover, notwithstanding the purchaser subsequently wrote to the auctioneer, returning the horse, "bought at your sale to-day," as not answering the warranty of the catalogue; the letter did not state the *price*, and it was not competent to connect it with the ledger, where alone the *price* was stated, so as to make a sufficient memorandum.

§ 554. In *Doolin v. Ward*⁴ it was declared that an agreement between two persons not to bid against each other at an auction sale is void as against public policy. It is unconscientious and tends to cause the property to be sold at an undervalue, or chill the sale, or stifle competition. But

¹ *Macdonald v. Henderson*, 10 C. of S. Cas., 95 (S. C.).

² *Reshton v. Whatmore*, 8 L. R. Ch. Div., 467.

³ 9 Q. B., 210, L. R.; *Allen v. Bennett*, 3 Taunt., 169. As to signature of auctioneer's clerk, see *Dyas v. Stafford*, 7 L. R. Jr., 590; *Alb. Law Jour.*, vol. 9, 278; *Shad-*

low v. Cotterell, 25 *Alb. Law Jour.*, 149.

⁴ 6 Johns. (N. Y.) R., 195 (1810); *Wilbur v. How*, 8 id., 444; 4 N. Y. Com. L. R., 599; *Thompson v. Davies*, 13 id., 112; *Gardiner v. Morse*, 25 Me., 140; *Haynes v. Cutchford*, 7 Ala., 189; *Hook v. Turner*, 22 Mo., 333; *Cocks v. Izard*, 7 Wall., 559.

it seems not to be illegal if the parties desire to be purchasers in good faith.¹ In that case certain articles were advertised to be sold at public auction. A. and B. agreed not to bid against each other; but A. was to buy the articles and divide them equally with B. The goods were bought by A. and he afterwards refused to divide them, or give to B. one-half the profits of the purchase. This action was brought to recover the one-half part of the profits.

The contract was held to be void for want of consideration, as being against public policy, and as it tended injuriously to affect the character and value of sales by auction. It was *nudum pactum*.

So in *Wilbur v. How*, *supra*, where a contract for making a road was put up for sale at auction, and A. and B. agreed that one of them should bid, and if the contract was struck off to him the other should have an equal share in it. It was struck off to B., and A. brought his action for a breach of the agreement between them; the court held that the contract was *nudum pactum*, and a fraud on the vendor.

§ 555. So in the recent case of *Parsons v. Phelan*,² where the plaintiff and the defendant agreed orally that the defendant should bid in, at an auction sale, and buy on joint account, in equal shares, certain property; the court said there was not a scintilla of evidence to show that the defendant agreed to bid for and buy one undivided half of the property for and in behalf of the plaintiff, as his agent; but it was shown that the defendant should buy the property "on joint account." Under these circumstances the contract was held to be within the statute of frauds, and the action not maintainable.

In *Holmes v. Holmes*³ the court said: "To render them

¹ *Jenkins v. Frink*, 30 Cal., 586; ² 134 Mass., 109.
Kearney v. Taylor, 15 How. (U. S.), ³ 3 Rich. Eq., 61; *National Bank*
 519; *Slater v. Maxwell*, 6 Wall., of *M. v. Sprague*, 20 N. J., 159, 169.
 268; *Jenkins v. Hogg*, 2 Const. See, also, *Galton v. Enness*, 8 Jur.,
 Ct. (S. Car.), 821; *Switzer v. Skiles*, 507; 13 Law J. N. S. V. C. B., 38.
 3 Gilman, 529; *Re Carew's Estate*,
 4 Jur. N. S., 1290; 26 Beav., 157.

(i. e., joint or partnership bidding) unlawful and void, there must be a fraudulent intent to depress and chill the sale, to obtain the property at an under value, or to obtain other undue and unconscientious advantages. An estate might be offered for sale which neither of two joint bidders would be able separately to purchase. Or, it might be that neither of two joint bidders, though able as to pecuniary means, would desire to purchase the whole of the estate offered for sale, though each would be desirous to become the owner of a part. Such persons, if not permitted to unite in their bidding, would not enter into the competition at all. To adopt so stringent a rule as that contended for, in reference to sales in chancery, would in many instances have the effect of diminishing instead of enhancing the prices."

§ 556. A puffer is a person appointed to bid on the part of the owner.

No principle is better settled than that by-bidding and the employing of puffers is fraudulent; that is, persons to secretly work in the interest of the owner of goods sold at auction, so as to enhance the price.

It prevents buyers from meeting on equal terms.

It violates a leading condition of the contract of sales at auction, that the goods shall be sold to the highest bidder — the highest real bidder.

It is against public policy.¹

The highest *real* bidder, if misled or deceived by such a proceeding, will not be bound to complete the contract, for no liability attaches.

§ 557. Some cases hold that the owner of goods to be sold at auction may lawfully employ a person to prevent the goods from being sacrificed; but biddings by such person must be *real and sincere*, not a mere artifice to mislead

¹ Veazee v. Williams, 8 How. (U. Nat'l Fire Ins. Co. v. Loomis, 11 S.) R., 154; 3 Story R., 623; People Paige, 431; 30 & 31 Vict., ch. 48, v. Lord, 6 Hun, 390; Jackson v. sec. 3; Mortimer v. Bell, 1 Ch., 10; Morter, 82 Penn. St., 291; Fuller v. Dimmock v. Hallock, 2 id., 21; Gilliat v. Gilliat, 9 Eq., 60; Grice v. Abrahams, 3 B. & B., 116; Raynes v. Crowder, 14 U. C. C. P., 111; Kendreck, 5 Q. B., 340.

others.¹ Nor is it against public policy if it be done *bona fide*. The employment of a bidder by the owner is or is not a fraud according to the circumstances tending to show innocence of intention or a fraudulent design.

But even this kind of bidding was declared at Westminster Hall, in *Crowder v. Austin*,² to be against sound policy. Doubtless the safer rule would be in all cases, that no person should be employed secretly to bid for the owner against a *bona fide* bidder at a public auction without an announcement of the fact. Chancellor Kent recognized this rule as the safest to be followed.

At any auction sale, if the owner desires to bid, that fact ought to be distinctly set forth in the condition of sale, so that bidders can act understandingly. "But if a mere artifice in combination with the owner to mislead the judgment and inflame the zeal of others, it would be a fraudulent and void sale."³

Text-writers and authoritative cases generally hold that the seller may reserve to himself the right of bidding, or may employ a person to bid for him, *but notice of such intention must be given at the sale, otherwise he commits a fraud and the sale may be avoided*.⁴

But the owner has a perfect right to limit the price at which his goods may be sold.⁵

§ 558. The nature of auction sales implies that the article sold should be struck off to the highest real bidder. There-

¹ *Walsh v. Barton*, 24 Ohio St., 28; *Lee v. Lee*, 19 Mo. R., 420; *Latham v. Morrow*, 6 B. Mon. R., 630; *Moncrieff v. Goldsborough*, 4 H. & McHen., 283; *Phippen v. Stickney*, 3 Met. (Mass.), 387; *Steele v. Ellmaker*, 11 Serg. & R., 86; *Wolfe v. Luyster*, 1 Hall, 146; *Morehead v. Hunt*, 1 Dev. Eq., 35; *Woods v. Hall*, 1 id., 411.

² *Blackford v. Preston*, 8 T. R., 93; *Rex v. Marsh*, 3 Y. & J., 331; *Benjamin on Sales*, 370.

³ *Hazel v. Dunham*, Hall, 655, 146; *Snell's Prin. of Eq.*, 489. Where an execution creditor adopted means to prevent competition at a sheriff's sale in order to secure the goods for himself at a nominal price, the sale was avoided. *Troup v. Wood*, 4 Johns. Ch. R., 228, 254.

⁴ 3 Bing. R., 368.

⁵ 2 Kent, 538, 539.

⁶ *Howard v. Castle*, 6 T. R., 642;

fore all such sales should be conducted in good faith; for the public are brought together upon a confidence that the goods sold will be disposed of in that manner. And this safe principle would be violated if the owner were allowed secretly to enhance the price by a person employed for that purpose. And yet tricks and practices of this kind do occur, and frequently good men give in to the ways of the bad and dishonest in their own defense. Such practices are a fraud upon the sale and upon the public.

The buyer should not be misled by any secret dealing or manoeuvring by the seller to enhance the price of the article sold. Custom, however, may go far to govern the conduct of such sales. But on the broad and sound principles of justice and equity the seller in all cases should be required to announce that he reserves the right, if he desires the right, of bidding his goods in at a price to be limited. Every person then would stand on common ground.

Thus, in *Bexwell v. Christie*,¹ where the seller falsely described his goods offered at auction as "goods of a gentleman deceased, and sold by order of his executor," Lord Mansfield pronounced it a fraud on the public. That "a bidding for the owner in the manner contended for, agreeable to the directions given in this case, would have been a fraud upon the sale; and consequently his action against the defendant as auctioneer cannot be maintained."

Tilghman, C. J., in *Steele v. Ellmaker*,² in referring to the somewhat sweeping opinion of Lord Mansfield in the above case, questioned whether the tone of his morality was not too lofty for the common transactions of business.

There have been men, however, who thought it immoral to purchase an article at less than its real value. In fact such was the conviction of the famous Roman lawyer, Sceavola, who, having purchased a commodity at less than its value, held himself bound to pay the difference. It will

¹ 1 Cowp., 395.

Bramley v. Alt, 3 Vesey, Jr. R.,

² 11 Serg. & Rawle, 88. See, also, 620, 625.

probably be a long time before an act of this kind will be recorded of a bidder at a modern auction sale.

§ 559. It is fraudulent for the vendor at an auction sale of goods, wares, or merchandise, as of other property, to employ by-bidders or puffers, to enhance the price. The English cases also hold that, whether the sale comes under the fourth or the seventeenth section of the statute of frauds, the same rule applies. In *Trust v. Delaplaine*,¹ where a picture was sold at auction, and it was shown that the price was enhanced by the vendor's bidding at the sale, Ingraham, First J., explicitly held that underbidding by the owner or auctioneer *vitiates the sale*.

In *Mortimer v. Bell*² one of the conditions was that the highest bidder should be the purchaser; but nothing was said as to bidding on behalf of the vendors. An agent of the vendors bid \$2,500; the auctioneer then bid \$2,600, and the agent and the auctioneer continued bidding against each other until the biddings reached \$3,600, when the defendant bid \$3,650, and the property was knocked down to him.

It was held, reversing the decision appealed from, that the vendors could not enforce the contract, tainted as it was with fraud. But, *query*: Suppose the bid of \$3,600 had been by a real bidder, would the sale have been vitiated?

§ 560. In *The National Bank of Metropolis v. Sprague*,³ where a *real* bid preceded that of the bid at which the property was knocked down, notwithstanding a puffer had bidden previously, the sale was held to be valid. The court intimated, however, that where a bid next preceding the *real* bid is that of a puffer, the sale would be voidable by the purchaser. But, judging the matter from an equitable standpoint, it would seem to be most just, and public policy would seem to dictate, that in every case where by-bidders

¹ 3 E. D. Smith (N. Y.), 219.

² 1 Ch. Dec., 10.

³ 5 C. E. Green (N. J.), R. In *Gray v. Veers*, 33 Maryland R., it

was held that in a sale by a trustee he is entitled to refuse any bid which will manifestly frustrate the purposes of the sale.

or puffers are employed to augment the price, the sale should not only be voidable, but absolutely *void*.

§ 561. In either case (whether a sale of goods or real estate) the writing of the name of the highest bidder in the sale-book, by the auctioneer, immediately on striking down the hammer, is requisite to constitute a signing within the statute of frauds. The employment of persons secretly to bid up the property at auction, whether of goods or land, is equally fraudulent.

Fisher v. Hersey¹ is an illustration. There, a motion was made to set aside a sale of land on the ground that the plaintiffs were induced to bid a larger sum than they otherwise would have, by reason of the fraud of the defendant Hersey in employing one Whittier, as a "puffer," to enhance the price; and on other grounds.

The referee reported that the conduct and representations of Whittier deceived the plaintiffs and were a fraud upon them. The special term made an order setting aside the sale, unless the defendants should stipulate that the plaintiffs' bid be reduced to an amount stated, and stand at that sum. An appeal was taken therefrom to the general term. There, Smith, J., said: "Laying out of view the misrepresentations made by Whittier before the sale, the conduct of Hersey and Whittier, at the sale, in pretending to be strangers to each other, according to their preconcerted arrangement, shows very clearly that the bid of Whittier was procured by Hersey to be made with the design of taking advantage of the eagerness of the plaintiffs to enhance the price. The employment of a puffer for such a purpose, and not merely as a *defensive precaution against an undue sacrifice of the property*, is a transaction that cannot be justified by a court of equity."

It was further held that the conduct of the defendant, Hersey, and of his instrument, Whittier, was a fraud upon

¹ 17 Hun (N. Y.) R., 370; Smith v. Clarke, 12 Ves., 477; Veazie v. Williams, 8 How. (U. S.) R., 148.

the plaintiffs, and that they were entitled to be released from their purchase.

§ 562. A sale by auction, "without reserve," according to all the cases, both at law and in equity, means that neither the vendor, nor any person on his behalf, may bid at the auction, and that the property shall be sold to the highest bidder, whether the sum bid be equivalent to the real value or not.¹

Martin, B., in *Warlow v. Harrison*,² says: "We think that the auctioneer who puts property up for sale upon such a condition pledges himself that the sale shall be without reserve; or, in other words, contracts that it shall be so; and that this contract is made with the highest *bona fide* bidder, and in case of a breach of it, he has a right of action against the auctioneer."

And so it would be held in "positive" sales by auction.³

§ 563. It was long ago settled that a sale of stolen goods at auction passes no title, and the auctioneer is liable to the real owner, notwithstanding the proceeds of the sale have been paid over to the thief, without notice of the felony.

Nelson, C. J., observes, in the noted case of *Hoffman v. Carow*,⁴ that there can be no doubt that the felon did not

¹ Benjamin on Sales, § 472; *Thornett v. Haines* 15 M. & W., 367.

² 1 E. & E., 295; 29 L. J. Q. B., 14; *Denton v. The Great Northern Railway Company*, 5 E. & B., 860. See, also, *Towle v. Leavitt*, 23 N. H., 360; *Kinney v. Showdy*, 1 Hill (N. Y.), 544; *Den v. Zellers*, 2 Halst., 153.

³ *Walsh v. Barton*, 24 Ohio St. R., 28.

⁴ 20 Wend. R., 21; *affd.* 22 Wend., 285; 13 N. Y. Com. L. R., 763. But see *Rogers v. Huie*, 2 Cal., 571. An exception to the above general rule exists in England, in respect to sales made in

market overt, but such rule has no application here. See *Saltus v. Everett*, 20 Wend., 267; 13 N. Y. Com. L. R., 850, and note. As to the liability of an auctioneer who sells stolen goods, see *Wheelwright v. Depeyster*, 1 Johns., 479; *Dame v. Baldwin*, 8 Mass., 518; *Towne v. Collins*, 14 id., 500; *Griffith v. Fowler*, 18 Vt., 300; *Browning v. Magill*, 2 Harr. & J., 308; *Buckenridge v. McAfee*, 54 Ind., 141; *Stone v. Marsh*, 6 Barn. & C., 551; *Ventress v. Smith*, 35 U. S. (10 Peters), 161; *Bryant v. Witcher*, 52 N. H., 158; *Coombs v. Gordon*, 59 Me., 111; *Spooner v. Holmes*, 102 Mass., 56; *Jones v. Nellis*, 41

acquire any title to the goods, and could not transfer title even to a *bona fide* purchaser. Therefore, as between the owner and the purchaser, the owner presents both legally and equitably the highest and best title. The owner is not in fault, as the property was taken without his knowledge or consent.

On appeal the questions involved were elaborately discussed, and able opinions were written by several members of the court. In favor of affirmance of the judgment were the chancellor, and Senators Clark, Edwards, Hunt, Hunter, Jones, H. A. Livingston, Nicholas, Paige, Peck, Powers, Skinner, Speaker, Sterling, Verplanck and Wager; opposed, were Senators Furman, Hawkins, Hull, Maynard and Works.

§ 564. The auctioneer may exercise a reasonable discretion as to declining to receive a bid of a person under certain circumstances.

Thus, it has been held that he may refuse to take or recognize the bid of a minor, lunatic, or of a person who is irresponsible; nor would such person have any remedy, unless by reason of some special condition or terms of the sale.¹

§ 565. A very novel case is that of *Harris v. Nickerson*.² There an action was brought to recover 2*l.* 16*s.* 6*d.* for two days' loss of time by the plaintiff, "at the special instance and request of the defendant," in attending at a public sale by auction, advertised by the defendant in the London newspapers to be held at the town of Bury St. Edmunds, on a stated day, for the disposal of certain goods and office fittings under bill of sale, and on the faith of which the plaintiff duly attended, and was ready to purchase in pur-

Ill., 482; *Easton v. Worthington*, 5 Serg. & R., 130; *Lance v. Cowan*, 1 Dana, 195; *Hosack v. Weaver*, 1 Yeates, 478; *Roland v. Gundy*, 5 Ohio, 202. Neither does a delivery of goods procured by fraud pass

any title. *Cary v. Hotelling*, 1 Hill, 311, note.

¹ *Kinney v. Showdy*, 1 Hill (N. Y.), 544; *Den v. Zellers*, 7 N. J. Law, 153; *Holden v. Jackson*, 11 U. C. C. P., 543.

² 8 Queen's Bench, 286 (1873).

suance of such request and public notification aforesaid; but the defendant, in breach thereof, did suddenly, and without notice, withdraw the said goods and office fittings from the sale, and by which the plaintiff lost not only his two days' time and railroad fare, but the additional expense of two days' board and lodging.

The sale was advertised as stated by the plaintiff. The plaintiff had a commission to purchase the office furniture advertised.

The furniture was not put up for sale. The judge gave judgment for the plaintiff. The defendant appealed. Blackburn, J., held that the judge was wrong. The proposition of the plaintiff was considered a startling one, "unless every declaration of intention to do a thing creates a binding contract with those who act upon it, and in all cases after advertising a sale the auctioneer must give notice of any articles that are withdrawn, or be liable to an action, we cannot hold the defendant liable."

Quain, J., concurred. He thought the proposition of the plaintiff was "destitute of all authority." That it would introduce an extremely inconvenient rule of law to say that the auctioneer is bound to give notice of the withdrawal of goods, etc. Archibald, J., was of the same opinion.

§ 566. A court of equity will set aside a sale made at auction where a mistake in a contract is induced by innocent misrepresentation, whether made by one only or mutually made.¹

And the doctrine is universally adhered to, that he who misleads the confidence of another by false statements in the substance of a purchase shall be the sufferer, and not the innocent party.²

Thus, in *Torrence v. Bolton*,³ where a bidder at an auc-

¹*Kennedy v. Panama Mail Co.*,
L. R., 2 Q. B., 580.

²*Doggett v. Emerson*, 3 Story,
733.

³L. R., 14 Eq., 124; 8 Ch., 118.
See *Champlin v. Layton*, 6 Paige,
189; *Smith v. Richards*, 13 Peters,
26. So statements by the auction-

tion sale was deaf and did not hear the conditions read as to the particulars of the property sold, and where the particulars as advertised were misleading, the court relieved the purchaser.

In general, the printed conditions of sales by auction are binding on the buyer and seller.¹

eer, contrary to the printed conditions of sale, are invalid, and will not be admitted in evidence to con-

tradict the printed conditions. *Gunnis v. Erhart*, 1 H. Bl., 289.
¹*Mesnard v. Aldridge*, 3 Esp., 271.

CHAPTER XXVI.

OF AUCTION SALES AND AUCTIONEERS—CONCERNING THE RETRACTION OF A BID.

- § 567. Of the highest bidder; a bid is an offer.
- 568. Contract by the bidder; mutuality.
- 569. When does the offer at an auction become a contract.
- 570. When may the bidder retract his bid.
- 571. Does the offer or bid become a contract upon the fall of the hammer, or upon the auctioneer writing the bidder's name in his sale-book.
- 572. Mutuality necessary; auction sales within the statute of frauds; memorandum in writing requisite.
- 573. The authority of a broker or agent may be countermanded before he has signed a contract; law writers on the subject of retraction of a bid.
- 574. The knocking down of the hammer by the auctioneer, under the principles of the common law, would make a binding contract; but query, whether so under the statute of frauds.
- 575. The entry constitutes the contract; *Gill v. Bicknell*.
- 576. The same subject; *Morton v. Dean*.
- 577. Case in point, *Ecroyd v. Davis*, holding that authority of auctioneer to sign on behalf of purchaser is revocable before actual signing.
- 578. Contract not complete until the statute of frauds complied with; *Pike v. Balch*; entry in sale-book a prerequisite.
- 579. Where there is a mistake as to price; acceptance necessary.
- 580. Effect of bidder's name being written down by the auctioneer before the hammer is knocked down.
- 581. Deductions from the cases.

§ 567. The highest bidder at an auction sale is the person who, *in good faith*, bids the largest price. If the bidding is in bad faith, it follows as a necessary consequence that it is misleading and void.

A bid is a mere proposal or offer, and the acceptance of such offer is signified by the act of the auctioneer knocking down the hammer. Down to that time, at least, the auc-

tioneer is *solely* the agent of the seller.¹ And whether the sale has been completed or not depends upon the mutuality of the parties, and the strict compliance with the requirements of the statute of frauds, as all such sales fall within the direct operation of the statute, and the law is strictly construed.

§ 568. Mr. Blackburn says it is established that the highest bidder at an auction, by the act of bidding, himself makes a contract of sale at that price subject to the conditions of sale, and he gives the auctioneer authority to sign that contract so made.

“But,” he says, “it is plain that neither auctioneer nor clerk has any authority from the bidder to make a contract for him. The bidder makes the contract himself, and all he authorizes is that the contract actually made shall then be signed. If, therefore, the auctioneer signs a contract, omitting or misstating the conditions of sale, he has not pursued his authority, and the bidder is not bound, though the contract on the face of it is complete.”

It is also settled by abundant authority that a contract of sale implies a bargain, or mutual understanding and agreement between the parties as to terms.²

§ 569. The cases and authorities accord in this, that the bidder may retract his bid at any time before the goods are struck off. In other words, until the consent to the sale is signified by the knocking down of the hammer, there is no mutual agreement to a definite proposition. But, say many cases, as soon as the hammer is struck down on a *bona fide* bid, that moment the bargain is concluded, and the seller has no right afterward to accept a higher bid, nor the buyer to withdraw from the contract.³

It would seem, in view of some well considered cases and authorities, that this doctrine partakes largely of the

¹ Williams v. Poor, 3 Cranch, C. C. R., 251; Bateman on Auctions, 20. ³ Cook v. Oxley, 3 Term R., 654; Adams v. Lindsell, 1 Barn. & Ald.,

² Blackburn on Sales, § 78; Steph- 681; Story on Sales, § 461.
en's Comm., vol. 2, p. 67.

common law principle governing contracts, and ignores the prime requirements of the statute of frauds.

It is doubtless true, on general principles, that when a person bids at an auction, he *offers* to pay a given price for the thing bidden on, and by implication authorizes the auctioneer to sign a memorandum containing the terms of that offer. If the offer becomes a contract, which according to some authorities it does upon the fall of the hammer on the highest real bid, the immediate entry thereof by the auctioneer in his sale-book is a valid memorandum of the contract if made in strict compliance with the statute of frauds. The auctioneer is, for this purpose, the agent of both the vendor and vendee, and his writing down the name of the highest bidder in his sale-book or catalogue, or both, as the case may be, is held to be a sufficient signature within the statute of frauds.¹

§ 570. While the foregoing propositions are sustained by several decisions, the question arises whether the bidder may not retract his bid after the fall of the hammer, and *before* the auctioneer has written his name in the sale-book?

The court, in a leading English case,² held that every bid at an auction sale is simply an *offer* on the part of the bidder, which is not binding until acceptance; and that a bidder can retract his bid at any time *before* the striking down of the hammer. But does the conclusion reached respecting the right of the bidder to retract his bid go as far as sound reasoning would seem to dictate or justify, in view of the requirements of the statute of frauds?

A parol agreement is good, but under the statute the evi-

¹Kenworthy v. Scofield, 2 B. & C., 945; Emmerson v. Heelis, 2 Taunt., 38; White v. Proctor, 4 id., 209, 409; Campbell on Sales, 223.

²Payne v. Cave, 3 Term R., 148 (1789); Warlow v. Harrison, 1 El. & El., 295; 6 Term R., 642; Towle v. Leavitt, 23 N. H., 360; Fisher v.

Hersey, 17 Hun (N. Y.), 370. It has been considered doubtful if the usual conditions against retracting biddings could, in the case of an ordinary sale by auction, be enforced. Jones v. Nanney, 13 Price R., 99.

dence of it must be in writing, in default of part payment or receipt of part of the goods sold.

In general, when the seller at an auction offers his goods for sale and a proposing buyer answers and offers to purchase at a stated price, the auctioneer, bringing down his hammer, signifies his assent to the price offered. This act on the part of the auctioneer is as much as to say, and no more, "Your offer is accepted, it's a bargain." But the statute seems to require something more; it requires some memorandum in writing of the *bargain*, to be *subscribed* by the party to be charged or by his lawfully authorized agent. If then the buyer, after the fall of the hammer, refuse personally to sign the memorandum, it would seem that he cannot be made to do so, nor can the auctioneer sign for him against his objection.

Hence it would seem to follow that, if the principal in such case refuse to sign, he possesses the legal right to withdraw or withhold his agent's (*quasi* agent's) authority to sign. The agent thereunto lawfully authorized, in the language of the statute, must be a person possessing authority to sign, and such authority must actually exist *at the time* of the signing. Therefore, logically, it would seem that if the striking down of the hammer is followed immediately by direction from the bidder to the auctioneer *not* to sign for him, or a refusal by the bidder to sign, the auctioneer cannot bind the bidder by signing his name, for the presumption of agency in the auctioneer is not borne out by the facts.¹

The right of retraction in such a case would seem to be not only in accordance with common sense, but in accord with the statute of frauds of several states.

By the doctrine contended for in several cases, that the highest real bidder is not bound unless the auctioneer has made a memorandum in sedulous compliance with the stat-

¹ 4 Canadian Law T., 562.

ute, it would seem to follow by parity of reasoning that the principle herein advanced is sustainable.¹

The simple question is, whether the test that a binding contract has been made, is the knocking down of the hammer on a *bona fide* bid, or the writing of the name of the bidder in the sale-book by the auctioneer.

A review of the cases will be found interesting.

§ 571. In general the knocking down the hammer upon the highest real bid is the signification by the seller, as well as the presumption of authority on the part of the auctioneer, to sign the bidder's name.

But a question involving some doubt under the decisions is, whether the highest real bidder becomes liable as purchaser upon the hammer being knocked down, or upon the bidder's name being written by the auctioneer in his sale-book?

In other words, is the act of the striking down the hammer tantamount to the bidder's signing a memorandum of the contract, and is the authority of the auctioneer as agent of the bidder at that point irrevocable? Quite clearly not, it would seem by some authorities. In accordance with the dictates of common sense, the retraction of the offer or bid, before the auctioneer has written down the bidder's name in his sale-book, even after the fall of the hammer, would be sufficient to relieve him from liability, and that in such a case no action would lie; for the auctioneer being solely the agent of the seller until the sale is completed, the bidder's renunciation of the auctioneer's agency, as far as he is concerned, ought, *ex æquo et bono*, to absolve him from liability. For, according to some cases, the auctioneer does not become the agent of the buyer until he has written down the name of the buyer in his sale-book. And according to the statute before referred to, of

¹ Tallman v. Franklin, 14 N. Y., 358; Coles v. Brown, 10 Paige, 526; 584; Smith v. Arnold, 5 Mason, 414; Pinckney v. Hagadon, 1 Duer, 89. Mews v. Carr, 38 Eng. L. & Eq.,

certain states and territories, as to *auction sales*, it is provided that whenever the auctioneer “enters in a sale-book a memorandum” specifying the particulars of the sale, *it shall be deemed a note of the contract of sale within the statute*.

§ 572. It is a principle of construction running through all the cases, that mutuality applies equally to auction sales as to other contracts of sale.

Hence, to constitute a valid and binding contract, the mutual assent of the vendor and vendee is essential, and must be so intended at the time.

In this connection it becomes important to inquire in what particular manner and to what extent the necessary consent must be manifested, and to distinguish between a mere offer by the one party not accepted by the other, and a mutual contract which neither party can retract.¹ An unaccepted offer to enter into a contract is not binding, nor can it give rise to any cause of action. Hence, if one person offers to sell goods to another, there is no binding force to such offer until the same has been accepted by the other.

Now, auction sales are not only adjudged to be within the statute of frauds, but a memorandum in writing of the sale is required to be subscribed by the auctioneer or the party. If then the bidder, *immediately* upon the hammer being knocked down, and before his name is written down, retracts his bid and declines to allow the auctioneer to sign for him, would he be bound? Under a reasonable construction of the statute it may be seriously questioned whether he could in any case be liable as the purchaser until the memorandum is actually subscribed with his consent.

Thus in well considered cases it is held that a bid at an auction sale is like an offer before acceptance, and when the

¹ Potts v. Whitehead, 8 C. E. 566; Gowing v. Knowles, 118 Mass., Green (N. J.), 512; Carr v. Duval, 232; Jenness v. Mt. Hope Iron Co., 14 Peters, 77; Abbott v. Shepherd, 53 Me., 20; Solomon v. Webster, 48 N. H., 16; Bruce v. Bishop, 43 Cal., 353; Sourwine v. Truscott, 17 Vt., 161; Thurston v. Thornton, 1 Hun, 432; Utley v. Donaldson, 94 Cush., 89; Smith v. Gouly, 8 Allen, U. S., 29.

bid is withdrawn before its acceptance there is no contract, and the bidder cannot be regarded in any sense as the purchaser.¹

§ 573. Mr. Bateman, in his excellent treatise on the law of auctions, says: "It may be doubted, indeed, whether the bidder may not retract his offer in those cases where a memorandum is required by the statute of frauds, at any time before the written entry is *actually made by the auctioneer*."²

In the cases cited in Campbell's Reports³ it is held that the authority of the broker may be countermanded at any time before a memorandum of the contract of sale is written and signed by him, pursuant to the statute of frauds, although he has previously entered into a verbal agreement to sell the goods.

Sales by auction, except such sales as are held under order of the court, are not only within the statute of frauds, but are governed by the *same principles of construction as other sales, or purchases by agents*.⁴

It may be stated as a settled doctrine of the law of agency, that, unless a person is agent of another by *authority* or adoption, his acts will not bind that other.⁵

¹ Fisher v. Leitzer, 23 Penn. St. R., 308; Blossom v. The Milwaukee & Chicago Railroad Company, 1 Wall. (U. S. R.), 655; 5 Am. Law Reg. (N. S.), 220; Chinnock v. Sainsbury, 30 L. J. Ch., 409; Crea-ger v. Link, 7 Md., 259; Simonton v. Minneapolis Bk., 24 Minn., 216; Reed v. Latham, 40 Conn., 452.

² Bateman on Auctions, § 30; 3 Stark. Ev., 3d ed., 1196.

³ Heyman v. Neale, and Farmer v. Robinson, 2 Camp., 338, and notes; also, Warwick v. Slade, 3 Camp., 127. In Day v. Wells, 30 Beav., 220 (7 Jur. N. S., 1004), the memorandum was signed by an

agent after the sale was made, and after the defendant had refused to forward the goods; the court there held that the defendant was not bound, because the agent had no authority to sign for the defendant when he did sign.

⁴ People v. White, 6 Cal., 75; Bozza v. Rowe, 30 Ill., 198; Baker v. Jameson, 2 J. J. Marsh. (Ky.), 547; Brock v. Jones, 8 Tex., 78; Bleeker v. Franklin, 2 E. D. Smith, 93; Rucks v. Barbour, 48 Ind., 274; Secret v. Twilley, 1 McMull. (So. Car.), 255.

⁵ Hankins v. Baker, 46 N. Y., 666; Price v. Dunn, 56 Barb., 648.

§ 574. The auctioneer, until after the hammer is knocked down, is in no sense the agent of the bidder.

As already shown, a bid is a mere proposal. Now a proposal may be withdrawn or revoked at any time before there has been such an acceptance as to be enforceable by law; that is, strictly speaking, in accordance with the requirements of the statute of frauds. Until the hammer goes down there has been no acceptance of the bidder's proposal. Under the rules of the common law, doubtless, such a proposal and acceptance would be binding upon the contracting parties without any writing.

But under the statute of frauds, and particularly in states where the statute recognizes and prescribes the manner of auction sales, as in New York, Minnesota, Wisconsin and some other states and territories, confirmation or sanction of the acceptance in order to be binding must be shown by some written memorandum subscribed by the buyer, auctioneer or authorized agent.¹

As such an agency is not irrevocable, it seems to follow that the bidder may revoke the implied agency existing in the auctioneer before the auctioneer has actually written his name in the sale-book.

If, then, the bidder revoke such agency and forbid the auctioneer to sign, clearly the auctioneer would have no right after that to sign so as to bind him. In order to constitute a valid contract, the assent must not only be mutual and be intended to bind both parties, but it must also co-exist at the same moment of time.

§ 575. In *Gill v. Bicknell*,² Shaw, C. J., in relation to auction sales, says that "where the name of the bidder is entered by the auctioneer, or by his clerk, under his direction, *on the spot*, and such entry is so connected with the subject and terms of sale as to make a part of the memo-

¹ Story on Agency, 234; Benj. on Sales, 471; *Head v. Diggon*, 3 M. & R., 97; *Routledge v. Grant*, 4 Bing., 653; *Johnson v. Roberts*, 30 Eng. L. & E., 234.

² 56 Mass., 358; *Cleaves v. Foss*, 4 Greenl., 1.

random, *it is a contract in writing*, so as to take the case out of the statute of frauds."

The technical ground is, that the purchaser, by the very act of bidding, connected with the usage and practice at auction sales, loudly and notoriously calls on the auctioneer or his clerk to put down his name as the bidder, and thus confers an authority on the *auctioneer or clerk to sign his name, and this is the whole extent of the authority*. All this presupposes that the name is written on a book or memorandum prepared, under a caption, stating the subject-matter and terms of sale; or, on the catalogue, advertisement, or written or printed conditions of sale; or so definitely referring thereto, as to make the paper referred to a part of the memorandum.

The bid is in the nature of an *affirmative answer*; and it is necessary to consider the proposal in order to understand the effect of the answer. Both together may constitute a contract, from which its substance and terms may be gathered.

§ 576. In *Morton v. Dean*¹ it was held that the putting down the name of a bidder was not a sufficient memorandum in writing, because it was not under a proper caption, and did not so definitely refer to any catalogue, advertisement, written or printed, or conditions of sale, as to make them part of the memorandum.

Says Shaw, Ch. J., in that case, "Commonly, the advertisement expresses the property to be sold, and if not the names of the owners, the actual owners, represented by the auctioneer, together with the time and the other terms of payment; so that when the *name* of the *bidder*, and the *price*, are added, the whole constitutes the elements and substance of a complete contract.

"But, it may be asked, a contract between whom? Obviously, the owner or owners on the one side, and the purchaser or purchasers on the other. . . . *Prima facie*,

¹ 13 Met., 385.

therefore, *the auctioneer's memorandum, or a memorandum by the bidder*, in his own name, *constitutes such a contract.*"

§ 577. The case of *Ecroyd v. Davis*¹ is quite in point as to retracting a bid. The action grew out of the sale of certain land by auction. The property was knocked down to the defendant as the highest bidder, and his name was written down by the auctioneer's clerk.

Immediately after the sale the defendant denied that he was the purchaser and declined to sign the contract. Negotiations were had to induce the defendant to sign the contract but he refused, and ultimately the auctioneer executed the contract on his behalf, and the plaintiff then sued for the difference between the price at which the property was knocked down, and the price which they afterwards obtained, and a verdict was rendered for the plaintiff.

On appeal the court held that, until the fall of the hammer, the auctioneer was agent only for the vendor to receive the bids; that he accepts the bid in that capacity; and that *the implied authority of the auctioneer to sign the contract on behalf of the purchaser is revocable at any time before actual signature.* The cases hold that the same rules apply to auction sales of goods as of lands. So that, according to this case, it is distinctly stated that it is the act of *signing*, and not the knocking down of the hammer, which is the true *test* whether a contract has been completed so as to satisfy the statute of frauds.

While the above principle is *implied* in several well-considered authorities and cases, there does not seem to be another case in the books — to use a phrase in court parlance — "on all-fours" with this.

The principle of it does not seem to be unreasonable; on the contrary, it seems to be just and in accordance with the policy, spirit and letter of the statute of frauds in those states where the statute requires the auctioneer to write in his sale-book the particulars of the sale made by him at the time of the transaction.

¹ 3 Australian Jur. R., 114.

§ 578. As an additional authority supporting the doctrine that it is the writing down the name of the highest bidder by the auctioneer in his sale-book, and not the act of knocking down the hammer, that binds the bidder, take the opinion of the court in the case of *Pike v. Balch*.¹

As it appears by the facts in that case, the schooner "Baltimore" went ashore in a fog on an island called the "Old Man," off Little Machias Bay, and was greatly damaged and full of water. After being advertised, the vessel and cargo were sold at *public auction* the day after the accident.

The questions on appeal in this case were as to certain requests for instructions to the jury. Some of them were as to the duties of auctioneers. It was conceded that auction sales were within the statute of frauds.

After quoting the section of the statute, Hathaway, J., said: "The auctioneer is the agent of both parties, and is bound to act for them both with equal fidelity; and his entry of the name of the purchaser on his book or memorandum containing the particulars of the contract is a sufficient signing of it within the statute.

"Until some one of those things required by the statute as necessary to complete the contract of sale be done, a time for repentance remains, and the sale is not perfected."

"Neither of these things necessary to complete the contract of sale having been done, the business remained unfinished and open for further proceedings."

But for the statute of frauds, no doubt, the highest bidder at an auction would be liable in damages for a refusal to take the goods bidden off *by him*.²

§ 579. Also take the case of *Phillips v. Bistolli*.³ There certain ear-rings were sold at auction and delivered to the purchaser, who, after detaining them three or four minutes,

¹ 38 Me., 310; *Martin v. Dana*, 13 219; *Bowser v. Cessna*, 62 Penn. Met., 385. St., 150, and cases cited.

² *Ashcom v. Smith*, 2 P. & W., ³ 2 B. & C., 511; *Greene v. Bateman*, 2 Wood. & M., 359.

handed them back, saying that he was mistaken in regard to the price. The vendor refused to receive the property, and brought his action and recovered a verdict. On appeal the verdict was set aside. The court, Abbott, C. J., says: "To satisfy the statute there must be a delivery of the goods by the vendor, with an intention of vesting the right of possession in the vendee, and there must be an actual acceptance by the latter, with an intention of taking to the possession as owner."

Thus, in this somewhat extreme case, it is obvious that the court assumed that the statute can only be satisfied by something done *subsequently* to the sale, and unequivocally indicating the necessity of the mutual intentions of the parties, and that mere words are insufficient.

§ 580. Again, suppose the bidder's name be taken down by the auctioneer in his book *before* the hammer falls, which the auctioneer is not authorized to do except as a *minute*, yet, if the act is adopted by the bidder after the hammer is knocked down, it will be a ratification and be binding. Therefore, it follows that, without ratification, the act of the auctioneer in thus writing down the bidder's name while solely acting as agent of the seller would not bind the bidder. Accordingly, in order to bind the bidder or buyer, it would have to be shown at the trial that he adopted the memorandum as his own, otherwise a recovery could not be had.

§ 581. The following deductions may be reasonably drawn from the cases:

As by the trend of many decisions, the highest bidder at an auction sale is not bound until the auctioneer has made a memorandum of the contract in accordance with the statute of frauds.

That there is nothing inconsistent in the auctioneer taking a higher bid, even after the hammer has been knocked down.¹

¹ Harvey v. Harris, 112 Mass., 32.

That the bidder may revoke the auctioneer's authority to sign for him after the hammer is knocked down, if the revocation takes place before the proper memorandum has been made by the auctioneer.¹

That the memorandum must be made at the time, *eo instanti*; or, at least, before any other business is entered upon.²

¹Ecroyd v. Davis, 3 Australian Jur. R., 114; 3 Vict. Law R., 228; 30 Moak, 670; Emmerson v. Heelis, 2 Taunt. R., 38; Walker v. Henning, 21 Gratt., 683. Howe v. Dewing, 2 Gray, 477 (*dictum*); McComb v. Wright, 4 John. Ch., 659; Goelet v. Cowdrey, 1 Duer, 132; Bamber v. Savage, 52 Wis., 113; Hunt v. Gregg, 8 Blackf., 109.

²Gwathney v. Cason, 74 N. Car., 7; Horton v. McCarty, 53 Me., 396; Fessenden v. Mussey, 11 Cush., 127; See *contra*, Barclay v. Bates, 2 Mo. App., 145; but see Daniel v. Harley, 3 Strobb. (So. Car.), 233.

CHAPTER XXVII.

OF PLEADING THE STATUTE OF FRAUDS.

- § 582. The statute of frauds did not alter the rules of pleading.
- 583. The defense under the statute is a personal one.
- 584. Not necessary to plead the statute of frauds where it does not appear that the contract was in writing.
- 585. Nonsuit will be reversed where part of goods have been delivered; *Austin v. Boyd*.
- 586. When is it unnecessary to plead the statute of frauds; *Porter v. Wormser*.
- 587. Appellate court will not consider the statute as a defense unless pleaded, or exceptions taken in the case.
- 588. Where the statute of frauds is pleaded in defense it is necessary to show that the contract was in writing, if it was required to be in writing.
- 589. When the declaration is not demurrable.
- 590. Unless pleaded the statute is waived.
- 591. When must the plaintiff declare on the special promise.
- 592. What is meant by the saying, "the statute has not changed the rule of pleading."
- 593. When will it be presumed that there was a memorandum in writing; *Hudnut v. Wier*.
- 594. When does the presumption arise that the contract was not in writing.
- 595. Unless the defendant denies the contract was in writing, he admits it; *Robbins v. Deverell*.
- 596. Defense of statute of frauds not available on appeal unless pleaded on a demurrer to the declaration; *Johnson v. Latimer*.
- 597. New matter not admissible unless pleaded.
- 598. Defense of statute to be pleaded, or declaration to be demurred to; *Wentworth v. Wentworth*.
- 599. Jurisdictional facts to be pleaded, when; if a contract must have been in writing, not necessary to plead the fact.
- 600. If striking out part of a plea erroneously did not result in preventing a party from proving his plea, judgment will not be reversed.
- 601. Plaintiff may submit to a nonsuit before verdict or decision.
- 602. Plea of readiness to pay necessary, when.

§ 582. It should be steadily borne in mind that the rules of pleading were not altered, nor in any wise affected, by the enactment of the statute of frauds.

It changed the rules of evidence. It was new only in the mode of proof which it established.

Mr. Justice Metcalf states the true rule of pleading under the statute of frauds in *Price v. Weaver*.¹

In that case he said, in substance, that a declaration on a promise which, though oral only, was valid by the common law, may be declared on in the same manner, since the statute of frauds, as it might have been before the statute.

"The writing," he says, "is matter of proof, and not of allegation."

Chief Justice Wade, in *Sweetland v. Barrett*,² asserts the same doctrine and quotes with approval the language of Mr. Justice Metcalf.

§ 583. It was said in an early Massachusetts case³ that the effect of the statute of frauds is that *the promiser*, who would otherwise be liable to such an action, may avoid it. A stranger to the sale cannot plead it. The statute as a defense is *personal* and cannot be interposed by strangers to the agreement.⁴

All this seems to be clearly set forth in *Richards v. Cunningham*.⁵ Like usury, infancy, and a variety of other defenses, it can only be relied on by the parties to the contract or their privies.⁶

¹ 79 Mass. (13 Gray), 272; *Elliott v. Jenness*, 111 Mass., 29; *Browne on Stat. of Fr.*, 505; *Hunter v. Randall*, 62 Me., 423; *Farwell v. Tillson*, 76 Me., 227.

² 4 Montana, 217; *Dabovich v. Ermeric*, 7 Cal., 211; *Mullaly v. Holden*, 123 Mass., 583; *Reed on Stat. of Fr.*, 501; *Winn v. Albert*, 2 Md. Ch. Dec., 169; *Green v. Richards*, 8 C. E. Gr., 32.

³ *Cahill v. Bigelow*, 18 Pick., 369.

⁴ *Bodkin v. Merit*, 102 Ind., 293;

Glenn v. Rogers, 3 Md., 312; *Browne on Stat. of Fr.*, 503-506; *Wright v. Jones*, 105 Ind., 17.

⁵ 10 Neb., 417.

⁶ *Eiseley v. Malchow*, 9 Neb., 174; *McCormick v. Drummatt*, id., 384; *Uhl v. Robinson*, 8 id., 272; *Robinson v. Uhl*, 6 id., 328. See, also, *Chicago Dock Company v. Kinzie*, 49 Ill., 289; *Simpson v. Pettus*, 7 Ala., 455; *Code of Ala.*, § 2121; *Phillips v. Adams*, 70 Ala., 373.

In *Eiseley v. Malchow*, *supra*, Lake, J., says: "The object of this statute is not to avoid sales of property satisfactory to the parties making them, although made without complying with its formalities, but it is merely to enable parties to such contracts, in case of dispute and litigation, to insist upon certain specified modes of proof in order to enforce them."

§ 584. As to pleading the statute of frauds, Philips, C., in *Springer v. Kleinsorge*,¹ in effect said: The fact not appearing whether the contract was in writing, it is *not* necessary in so many words to plead the statute *eo nomine*. "Where the defendant in his answer denies the contract, it is not necessary for him to insist upon the statute as a bar."²

It has been held sufficient if raised by a general denial.³

The most recent and reliable decisions hold that to be available on the trial the statute of frauds must be pleaded.⁴ Such is clearly the law in Missouri. Such was also the common law rule. It does not seem to be available by demurrer.⁵

§ 585. In *Austin v. Boyd*⁶ it appeared that the defendant bought of the plaintiff thirteen hogsheads of tobacco, at \$8 per hundred; that he received and paid for six of them in pursuance of the contract of sale, but refused to receive and pay for the remainder; that the plaintiff, after keeping the remaining hogsheads for a time stated, after having given the defendant ample notice, advertised and exposed the same for sale to the highest bidder.

The action was for the difference between the price which

¹ 83 Mo., 155.

² *Hook v. Turner*, 22 Mo., 333; *Wildbahn v. Robidoux*, 11 Mo., 600.

³ *Bliss on Pl.*, 353; *Wiswell v. Tefft*, 5 Kan., 263.

⁴ *Donaldson v. Newman*, 9 Mo. App., 235.

⁵ *Futches v. Futches*, 24 Alb. Law J., 498. It seems to be held that the statute is not available as

a defense to an action for goods sold and delivered, either where the answer admits the delivery, or where it fails to plead the statute as a defense. So held in *Graff v. Foster*, 67 Mo. R., 513; *Sherwood v. Saxton*, 63 Mo. R., 78; *Mullaly v. Holden*, 123 Mass., 583.

⁶ 23 Mo. App., 317.

the remaining hogsheads brought and the price which the defendant had agreed to pay for them.

The answer traversed all the allegations of the petition. The defense was the statute of frauds.

Thompson, J., said: "It is plain that the court erred in the instruction for a nonsuit, since the delivery of a part of the tobacco under a contract for the sale of the whole would take the case out of the statute."

Other errors declared by the court were: The refusal to allow a witness, who had kept the books of the firm through whom the contract was made, to refer to the books to refresh his memory upon a material point; and the refusal to allow the witness to testify as to the prices for which the remaining hogsheads of tobacco were sold, after using the books to refresh his memory, on the ground "that the auctioneer was the best evidence."

The judgment of nonsuit was reversed and the cause remanded.

§ 586. It is well settled that to be available the defense of the statute of frauds must be pleaded. In general, the grounds of objection should be taken in the complaint. But where a case is shown *on the face of the complaint to be within the statute*, it would seem to be unnecessary to plead it.

In the case of *Porter v. Wormser*,¹ where the complaint in effect alleged the existence of a contract for the purchase of certain bonds, and sought to avoid the loss charged thereon on the ground of fraud in the inception of the contract, and because the sale under the "stop-order"² was made in disregard of the price limited therein; such ground of objection having been taken for the first time in the "requests for findings," and that the original contract of pur-

¹ 94 N. Y., 431 (1884). See, also, *Hedges v. Strong*, 3 Oregon, 19; *Hayden v. Steadman*, 3 id., 550.

² The meaning of "stop-order," as given by a witness, "is to await a certain figure, and whenever this figure is reached, to stop the transaction by then selling or buying, as the case may be, as well as possible." Page 443.

chase was void by the statute of frauds, there being no note or memorandum of the contract signed by him, the court, Andrews, J., said: "It cannot be doubted that if the defendants had brought an action to recover a balance claimed to be due on the contract for the purchase of the bonds, without disclosing whether the contract was oral or written, the plaintiff would have been bound to plead the statute to avail himself of its protection.

"The plaintiff, having become an actor, and brought an action to impeach the account on grounds which implied the existence of a formal contract, is not in a position to question the validity of the contract under the statute."¹

So, also, if the defendant does not insist upon the defense of the statute, he is fairly presumed to have waived it; and the rule is, *Quisque, renuntiare potest juri pro se introducto.*²

§ 587. In *Bommer v. American Spiral Spring Butt Hinge Manufacturing Company*,³ the complaint in substance set forth that the plaintiff assigned to the defendant his interest in an invention, consisting of an improvement in spiral spring butt hinges, together with the patent therefor, which had been applied for. Though the nominal consideration therefor was \$1, the actual consideration was *one cent for each hinge which should be manufactured by the defendant*. That the patent was issued, and the defendant manufactured the same, but had never accounted for or paid over the money accruing under said agreement, except the sum of \$10.31, and that there was a large sum owing the plaintiff, and an accounting was prayed for. Rapallo, J., said: "There is no exception in the case raising

¹ See, also, *Cozine v. Graham*, 2 Paige's Ch. R., 177; *Vaupell v. Woodward*, 2 Sandf. Ch., 143; 2 Story's Eq., § 755. *Babcock v. Meek*, 45 Iowa, 137, and sections 3663, 3666, 3667, of the code of that state.

² Newland on Contracts, ch. 10, p. 201; *Rondeau v. Wyatt*, 2 H. Bl., 68; *Spurrier v. Fitzgerald*, 6 Ves., 548; *Flagg v. Mann*, 2 Sumner's R., 489, 528, 529. See, also, ³ 81 N. Y., 468. In *Kraft v. Greathouse*, 1 Idaho R., 254, it was held that the statute of frauds must be pleaded in the court below, or it cannot be considered upon the appeal.

any question under the statute of frauds. The statute is not pleaded, nor was there any objection to the proof of the agreement sued upon, by oral testimony, nor is there any exception to any finding or conclusion which presents any question under the statute. No such question can, therefore, be considered on this appeal."

§ 588. The complaint, in *Marston v. Sweet*,¹ alleged that prior to a stated date the plaintiff and defendants were joint owners of a patented invention, known as "Hawk's Auxiliary Air Chamber for stoves, heaters and furnaces," and it was agreed between them that in consideration that the plaintiff would not license others to use the invention, but give the defendants the exclusive right, they would manufacture the stoves with the invention attached and pay the plaintiff fifty cents for each stove, heater or furnace so manufactured and sold by them; and the plaintiff claimed to recover the license fees due up to a certain date. Earl, J., said: "It is claimed by the defendants that the contract sued on is void under the statute of frauds, as it was not to be performed within a year and was not in writing. A contract, valid in form, is set out in the complaint, and it does not there appear that it was in writing. It was not necessary to allege that it was in writing. For the purposes of the complaint that will be presumed. If the contract alleged in the complaint had been denied, or the statute of frauds had been set up as a defense, then it would have been necessary upon the trial to prove that the contract was in writing, if it was one which the statute required to be in writing." There was no averment that it was void on that account. . . . "Hence, it may be assumed that the statute of frauds furnishes no defense to the action in its present condition."

§ 589. An important case in Vermont upon the subject of pleading the statute of frauds is *Hotchkiss v. Ladd*.²

¹ 66 N. Y., 206. See *Moak's Van* Y. 226; *Quinlan v. Raymond*, 3 N. Santvoord's Pl., 203, and cases Y. Stat. R., 573.
cited; *Duffy v. O'Donovan*, 46 N. 236 Vt., 593; 86 Am. Dec., 679.

The position taken by the court, Poland, C. J., is the same as is laid down in Browne on the Statute of Frauds, that the declaration need not allege the promise to be in writing, and if the facts alleged show a contract that would be binding if evidenced by a writing, the declaration is not demurrable because it is not stated to be in writing.

At the end of this case, as given in volume 86 of the American Decisions, the able editor, Mr. A. C. Freeman, has presented a valuable brief of many leading cases of the several states on the subject of pleading the statute of frauds, which will well repay a careful perusal.

§ 590. In *Howe v. Chesley*,¹ the court, Redfield, J., says, touching the facts in that case, it is true that the promise is not binding, as within the statute of frauds. By several Vermont cases he shows that, unless pleaded, the statute is waived, and that *when a contract is once proved, without objection to the manner of proof, it becomes a valid contract.*²

§ 591. In *Louisville Prize Mining Company v. Scudder*,³ the court, A. W. Stone, J., laid down the following sound principle of pleading: "If the agreement is one embraced within the terms of the statute of frauds, then the plaintiff must declare on the special promise."

§ 592. It is settled that the statute of frauds did not alter the form or rule of pleading.

In *Krohn v. Bantz*,⁴ Worden, J., apprehends the true principle to have been that, where the declaration counted upon a contract within the statute of frauds, not alleging it to

¹ 56 Vt. 731; *Montgomery v. Edwards*, 46 Vt., 151; *Hotchkiss v. Ladd*, 36 Vt., 593.

² *Adams v. Patrick*, 30 Vt., 519. In *Strong v. Dodds*, 47 Vt., 348, it was held that, if a defendant allows a contract to be proved by parol evidence, he waives the statutory objection.

³ 3 Col., 154; *Cummings v. Stone*, 13 Mich., 70; *Fuller v. Rice*, 52 id.,

435. In *Hayden v. Steadman*, 3 Oregon, 552, Boise, J., says that, in cases of collateral undertaking under the statute of frauds, the plaintiff should declare specially. Where the plea was the *general issue*, the benefit of the statute was held to be waived. *Martin v. Blanchett*, 77 Ala., 288.

⁴ 68 Ind., 281. See, also, *Harper v. Miller*, 27 id., 277.

have been by parol, and not alleging any matter that would take it out of the statute, the declaration is good *because* the contract alleged may have been in writing, and *not because* there may have been other matters not alleged that would take the contract out of the statute; and this, he says, is all that is meant when it is said that *the statute has not changed the rule of pleading, and furnishes only a rule of evidence.*

In this case, the court, after reviewing the pleading and the facts, comes to the conclusion that a complaint on a parol contract within the statute, which does not show that the purchaser has received part of the property or given something in earnest to bind the bargain, or in part payment, does not state facts sufficient to constitute a cause of action.¹

§ 593. In *Hudnut v. Wier*² it appeared that Wier sold to Hudnut five thousand bushels of corn, then owned by him, at fifty cents per bushel, the same to be delivered on the bank of the Wabash river, the purchaser agreeing to furnish the sacks in which to put the corn after it was shelled. The defendant furnished and delivered to the plaintiff fifteen hundred sacks of the value of \$100; after the plaintiff had shelled the corn and put it in the sacks, the defendant refused to receive and accept the same. The plaintiff sold the corn at a sacrifice, and sustained damages.

"A demurrer was overruled to the complaint, and this ruling is assigned for error." The court, Mitchell, J., said: "There being no averment in the complaint that there was a 'note or memorandum in writing of the bargain,' it will be presumed, following the rule in *Krohn v. Bantz*,³ that no writing was signed."

As there was no memorandum in writing, and as the delivery of the sacks to the seller did not take the case out of the statute of frauds, the contract was void.

So, in *Dickson v. Lambert*,⁴ Bicknell, C. C., said that,

¹ *Cozine v. Graham*, 2 Paige, 177.

³ 68 Ind., 277.

² 100 Ind., 501.

⁴ 98 Ind., 491.

where a contract is not averred to be in writing, it is taken to be verbal, and a memorandum of such a contract, although sufficient to take it out of the statute, is not the contract itself.

· § 594. So, in the important case of *King v. Enterprise Insurance Company*,¹ the court, Buskirk, J., said: "If a pleading is based upon an instrument which is required to be in writing (here the action was upon an insurance policy insuring a certain interest in the steamboat Empire), it will be subject to demurrer, unless the original or a copy is filed with such pleading. If a pleading alleges a contract to be in writing, it will be bad on demurrer, unless the original or a copy is filed and made a part of such pleading."

Thus, also, in *Harper v. Miller*,² the court held that under the code of Indiana, if a contract is not alleged to be in writing, and no copy is filed with the complaint or answer, the presumption arises that the contract declared on is *not a written one*, and if the contract is such as is required by the statute of frauds to be in writing, the objection may be taken by demurrer.

§ 595. In *Robbins v. Deverill*³ the complaint averred that the defendant bought of P. & W., at Menasha, one hundred barrels of flour, at \$4.80 per barrel, payable on delivery. The flour was shipped by water from Menasha to Green Bay for defendant, and was delivered, but the defendant refused to pay for the same.

The claim was assigned to the plaintiff, who brought this action.

To the usual complaint, the defendant set up a denial of the assignment; that the plaintiff was not the real party in interest, and a counter-claim. A reply denied the counter-claim.

Dixon, C. J., declared at the outset that it was a settled

¹ 45 Ind., 43, 54; *Tinkler v. Swaynie*, 71 id., 562; *Suman v. Springate*, 67 id., 115.

² 27 Ind., 277; but see *Bunting v. Beideman*, 1 Cal., 182.

³ 20 Wis., 142. See, also, *Winslow v. Bradley*, 15 Wis., 394.

rule before the enactment of the code, that, in pleading a contract which the statute of frauds *requires to be in writing*, it was not necessary to allege the facts relied on to take the case out of the statute.

“It is sufficient, on demurrer, to allege that a contract was made. Such an allegation *implies* that the contract is in writing, and valid under the statute.”

As the complaint averred that the flour was delivered according to the terms of the sale, the court says, “the presumption being that the contract of sale was in writing, and subscribed by the defendant as required by the statute (sec. 3, ch. 107, R. S.), . . . and no question of the receipt or acceptance of the flour by the defendant, so as to take the case out of the statute, in case there had been no contract in writing, is presented. . . . By not denying the sale as alleged in the complaint, the defendant admits it to have been in writing; and this, with admission of the delivery at Menasha in pursuance of it, is, under the statute, in all respects equivalent to an acceptance in fact of the flour by the defendant at Green Bay, in case there had been no writing. For this reason the court was right in overruling the defendant’s objection to the admission of any evidence under the complaint, and in refusing to give the instruction asked upon this point. The instruction was wholly immaterial under the pleading.”

The court took the further ground that the *indebtedness* was explicitly *admitted by the answer*.

Downer, J., in the case, expressed the opinion that the only way the defect of parties plaintiff could have been taken advantage of was by demurrer or answer, and if not so taken it was waived.

§ 596. *Johnson v. Latimer*¹ was an action brought to recover on an open account. The evidence showed that the plaintiffs sold Johnson a “separator,” one-half the price of which being payable on delivery, and the other half amount-

¹ 71 Ga., 470; *Printup v. Barrett*, 46 Ga., 411.

ing to \$212.50, was the subject of this action. The general defense was that a "portable separator" was desired, for the purpose of hauling it about the country with his team, and that Latimer guarantied that the machine should be what he desired in this regard.

It was contended that, as this was a verbal contract for the sale of goods to the amount of \$50 or more, it was obnoxious to section 1950, par. 7 of the code, and was, therefore, invalid. But the court, Hall, J., said: "This defense was not specially pleaded. No motion was made to nonsuit the case at the close of the plaintiff's evidence, nor was any demurrer taken and urged on this distinct ground." And thus not available on appeal. In *McDougald v. Banks*,¹ Nisbet, J., said: "*It is a safe rule always to plead the statute.*"

§ 597. In the recent case of *Landis v. Morrissey*,² the complaint alleged that the plaintiffs sold and delivered certain goods to Boch & Morrissey; that Boch died leaving the defendant the sole surviving partner. The answer denied the allegations of sale as stated in the complaint.

The court held that evidence that the goods were sold on a credit of "sixty days" was not new matter, and was admissible without being specially pleaded.

§ 598. In *Wentworth v. Wentworth*,³ the court, Flandrau, J., says that the defendant did not waive the effect of the statute of frauds by not pleading it. That *he is only bound to plead it in defense when it does not appear in the complaint that the contract was by parol.* Where it does so appear, and no part performance is alleged to take it out of

¹ 13 Ga., 451; *Clark v. Terry*, 25 Conn., 399. Defendant need not plead the statute. See *Givins v. Calder*, 2 DeS., 171.

² 69 California, 83; *Osborne v. Endicott*, 6 Cal., 149.

³ 2 Minn., 277; *Tarleton v. Vietes*, 1 Gil., 470; 41 Am. Dec., 195. This case holds that "it is a settled principle of equity, that a party,

to avail himself of the benefit of the statute of frauds, must specially insist on it." If the answer substantially admits the contract sued on, and sets up a breach, but fails to plead the statute of frauds in bar, the defendant is presumed to have waived it. *Connor v. Hingtgen*, 19 Neb., 472.

the statute, *the defendant is not bound to plead the statute, the complaint is demurrable, and materially defective.*

The appeal here arose out of a suit for the specific performance of a parol agreement to convey certain lands; but it will serve to show the trend of the decisions generally on this subject.

§ 599. In *Smith v. Auerbach*¹ the complaint set forth that the chattel mortgage, therein involved, was in violation of the bankrupt act, but failed to show wherein it violated that act. The jurisdictional facts were not pleaded. The court, Knowles, J., said: "These facts ought to be specifically pleaded to allow a party to introduce proof thereof." An allegation that the mortgage is void is not specific enough.

It seems to be a well settled rule of pleading at common law, that where the contract must have been in writing under the statute of frauds, it was not necessary to show that fact in the declaration.² For, as already observed, the statute of frauds applies to the evidence, and not to the pleadings.³

§ 600. If certain parts of a plea be stricken out, and even if improperly stricken out, yet if, upon the inspection of the whole record, it be found that no harm resulted to the defendant therefrom by reason of his being permitted to prove all that he alleged in his special plea which was stricken out, it is no cause for reversing the judgment.⁴

§ 601. Under the decision in *Partridge v. Wilsey*,⁵ it is held that, where no set-off is pleaded, it is always allowed to the plaintiff to submit to a nonsuit at any time before the jury return with their verdict; and where the trial is by the court, at any time before the court makes its decision.

¹ 2 Montana, 348; *Sweetland v. Barrett*, 4 id., 217.

² 1 Chitty's Pl., 222.

³ *Mills v. Kuykendall*, 2 Blackf., 47; *Miller v. Upton*, 6 Ind., 53.

⁴ *Grand Chute v. Winegar*, 15 Wall., 355; *Chambers County v.*

Clews, 21 id., 317; *Sloan Saw Mill & Lumber Co. v. Guttshall*, 3 Colorado, 11.

⁵ 8 Iowa, 461; also, as to pleading the statute, see *Babcock v. Meek*, 45 Iowa, 137.

§ 602. *Porter v. Rose*¹ was an action on a contract for six thousand gallons of whisky at seventy cents, to be delivered at Buffalo, and to be paid for on delivery. On the trial the defendant's counsel moved for a nonsuit, because the plaintiff had not shown a readiness to pay. The objection was overruled on the ground that this was not necessary. Spencer, J., said: "It is fully settled in a variety of modern cases which have disregarded the artificial and subtle distinctions of former times, and looked to the real intention and meaning of the parties, that when two acts are to be done at the same time; as where the one agrees to sell and deliver, and the other agrees to receive and pay, an averment by the purchaser, in case he sues for the non-delivery, of a readiness and willingness to pay, is indispensably necessary; and that, consequently, the readiness and willingness to pay is matter to be proved on his part, whether the other party was at the place ready to receive the thing contracted for or not." The following cases hold that a readiness must be averred; but none go so far as to say that actual proof of readiness must be given at the trial.

It is a general rule, however, that all material averments must be proved.

¹ 12 Johns., 209. See *Chaplin v. Rogers*, 1 East, 195, 203; *Topping v. Root*, 5 Cowen, 404.

CHAPTER XXVIII.

OF LAW OF PLACE OF THE CONTRACT AS AFFECTED BY THE STATUTE OF FRAUDS.

§ 603. Of the *lex loci* as to validity of contracts under the statute of frauds.

604. How the question resolved; *Marie v. Garrison*.

605. Must the contract satisfy the law of the place where made and where enforced; different views expressed.

606. Law of place of contract governs; *Dacosta v. Davis*.

607. Same subject; Judge Story's opinion; as to limitation of action governed by the *lex fori*.

608. Another example; *Elmendorf v. Taylor*.

609. When does the law of place of *delivery* govern.

§ 603. The statute of frauds of several of the states simply lays down *a rule of evidence*,¹ while the statute of some other states declares the contract itself *void* unless it complies with the statute.²

It is a question of growing importance as to which statute is to apply as affecting sales of goods, etc.—the statute of frauds of the state where the bargain is made, or of the state where the action is commenced.

The rule seems to be of almost universal application, that, if a contract is valid where it is made, it is to be deemed valid everywhere; and also that the law of the *place of the contract* is to govern as to the remedies under it.

This general subject has been quite frequently passed upon by the courts.

¹ Arkansas, California, Connecticut, Dakota, Florida, Georgia, Indiana, Maine, Maryland, Massachusetts, Michigan, Missouri, New Hampshire, South Carolina and Vermont.

² Arizona, Minnesota, Montana, New Jersey, New York, Nevada, Oregon, Wisconsin and Wyoming Territory.

§ 604. Perhaps the most recent case where this question has been discussed is that of *Marie v. Garrison*.¹ There, Professor Dwight declares the rule to be readily resolved, by inquiring whether the statute of frauds in the particular state where the contract is made is in words which manifest only a *rule of evidence*, or in that which declares the contract itself *void* if it does not comply with the statute of frauds.

§ 605. In Mr. Reed's elaborate treatise on the statute of frauds, the position seems to be taken, that, in order to be enforceable by law, the contract ought to satisfy the statute of the place where it is made, as well as that of the place where suit is brought.²

In discussing these contrary views an able law journal remarks:

"Professor Dwight's analysis of the language of the statute, however, compels more attention than Mr. Reed seems inclined to give it, and it is difficult to see on what ground Mr. Reed can sustain his rule that the law of the forum must also be satisfied in those cases where the law of the forum does not prohibit an action nor relate to the question of evidence, but simply declares that the contract shall be void if not in such a form.

"This distinction seems to be indirectly supported by the doctrine of the Massachusetts cases, which we understand are strongly insisted on at Harvard, distinguishing between the memorandum and the contract and holding the contract valid, but not enforceable unless a memorandum has been made, and going so far as to hold that although the contract, as distinguished from a memorandum, cannot be proved for the purpose of sustaining an action, it may be proved by oral evidence for the purpose of showing that the memorandum offered as embodying it did not truly state the contract it pretends to, and thus defeating the action."³

§ 606. A well considered New Jersey case seems to sus-

¹ 13 Abb. N. C., 210.

³ N. Y. Daily Register, Sept. 14,

² Reed on Stat. of Frauds, 16, 18. 1885.

tain the doctrine laid down in *Marie v. Garrison*.¹ In that state the statute of frauds provides that every contract for the sale of goods, etc., for the price of \$30 or upwards "shall be void, unless," etc. The decision in *Dacosta v. Davis*² goes to the point that a contract made in New Jersey for the sale of goods of the value of \$30 or more, situate and to be delivered in Philadelphia, must comply with the requisites of the statute of frauds of New Jersey, or the contract will be *void*.

Thus, also, in *Houghtaling v. Ball*,³ it was directly held that an oral contract for the sale of goods, made in a state where the statute of frauds does not prevail, can be enforced in Missouri, where the statute of frauds does exist substantially in the language of the seventeenth section of the English statute; the words being, "No contract," etc., "shall be allowed to be good, unless," etc.

§ 607. In general the authorities and cases under the civil, as well as common law, seem to concur in fixing the rule that the nature, validity and construction of the contract is to be determined by the law of the place where the contract is made, and, if valid and enforceable there, the contract is valid and enforceable everywhere.

And thus, in substance, Mr. Justice Story says, that where a contract for the sale of goods is made by parol in a country by whose laws it is required to be in writing, is sought to be enforced in any other country, it will be held void in the state or place where it is made. And the like rule applies, *vice versa*, where parol contracts are good by the law of the place where they are made.⁴

But it seems that whatever relates to questions of limitation of the action is to be determined by the *lex fori*.⁵

¹ 13 Abb. N. C., 210.

² 4 Zabriskie (N. J.), 319.

³ 20 Mo. R., 563. The statute of frauds of Iowa provides that "no evidence, etc., is competent," while the English statute reads "no action shall be brought," etc. The

effect is the same. *Westheimer v. Peacock*, 2 Iowa, 528.

⁴ Story's Conflict of Laws, § 262; *Alves v. Hodgson*, 7 T. R., 241; *Clegg v. Levy*, 3 Camp., 166.

⁵ *Bulger v. Roche*, 11 Pick., 36.

These principles seem to be generally received, except in cases where, from the tenor of the contract, it is perceived that it was entered into with a view to the laws of some other state or country.

§ 608. Thus, in *Elmendorf v. Taylor*,¹ Parker, C. J., clearly states the rule as to the *lex loci* as follows: "When a merchant of France, Holland or England enters into a contract in his own country, he must be presumed to be conversant of the laws of the place where he is, and to expect that his contract is to be judged of and carried into effect according to those laws; and the merchant with whom he deals, if a foreigner, must be supposed to submit himself to the same laws, unless he has taken care to *stipulate* for a performance in some other country, or has in some way excepted his particular contract from the laws of the country where he is."

The doctrine above enunciated seems to have been generally followed. It is sound, just and reasonable, and readily understood.

§ 609. Where goods are bargained for by a merchant in one country, to be paid for on delivery by a merchant in another country, who is domiciled there, and has given the order therefor; and the law of the country where the bargain is made does not require that there should be any note or memorandum thereof in writing; but the law of the country where the delivery is to be made does require such a memorandum, in such case it seems to be held that *the law of the place of delivery governs*, at least according to the English authorities.²

¹ 10 Wheat. R., 36; *Hill v. Spear*, 50 N. H., 253; *Wilcox v. Hunt*, 13 Pet., 379; *Shellits v. Reineking*, 18 Weekly Dig., 13; *Saul v. His Creditors*, 17 Mass., 587; Alb. Law Jour., Dec. 16, 1882, p. 491; 2 Kent's Com. (ed. 1866), 454; *Thompson v. Ketchum*, 8 Johns. R., 192, Kent, Ch. J.

² *Acebal v. Levy*, 10 Bing. R., 376. But see *Vidal v. Thompson*, 11 Martin R., 23, 24, 25. The Lord Chancellor, in *Pattison v. Mills*, 1 Dow. & Clark R., 342, said: "If I, residing in England, send down my agent to Scotland, and he makes contracts for me there, it is the same as if I myself went there and

As a beacon, however small, may serve to guide the mariner safely into port, so the foregoing notes, however brief, may serve to guide the practitioner in the way of reaching a conclusion as to the *lex loci* and the *lex fori* in contracts affected by the statute of frauds.

made them." See, also, *Albion F. 2 Russell R.*, 351; *James v. Cather-*
& L. Insur. Co. v. Mills, 3 Wils. & wood, 3 Dowl. & Ryl. R., 190.
Shaw, 218, 233; *Wynne v. Jackson*,

APPENDIX I.

CONTAINS THE SECTION OF THE STATUTE OF FRAUDS, OF THE SEVERAL STATES AND TERRITORIES, IN RELATION TO THE SALE OF GOODS, WARES AND MERCHANDISE, CHATTELS AND THINGS IN ACTION, AND PERSONAL PROPERTY GENERALLY; AND ALSO AS TO AUCTION SALES.

ALABAMA.

At the present time there is no provision in the statute of frauds of this state relative to the sale of goods, which formerly existed. The code of 1852, § 1551, and prior to the act of 1862, the statute contained the following clause: "Every contract for the sale of goods, chattels or things in action, for a price exceeding \$200, unless the buyer accepts and receives part of such goods and chattels, or the evidences, or some of them, of such things in action; or, unless the buyer at the time pay some part of the purchase money, is void."

The original section as to auction sales contained the words "goods, or things in action are sold, or," etc., was repealed by the act of November 7, 1862, but was inadvertently retained in the code until 1876, when it was omitted. The clause in the code (§ 1863) as to the sale of lands, etc., at public auction, is still in existence. By which act it is provided that the auctioneer, his clerk, or agent, must make a memorandum of the property, the price, the terms of sale, the name of the purchaser, and the name of the person on whose account the sale is made, and such memorandum is declared to be a note of the contract.

The leading cases, prior to the repeal of the above section, are given in the body of this work.

ARKANSAS.

Digest of the statutes of this state by Edward Wantt, 1874; also, Revised Statutes, 1838, ch. 30, § 1, etc.:

“No contract for the sale of goods, wares, and merchandise, for the price of \$30 or upwards, shall be binding on the parties, unless, first, there be some note or memorandum, signed by the party to be charged; or, second, the purchaser shall accept a part of the goods so sold, and actually receive the same; or, third, shall give something in earnest to bind the bargain, or in part payment thereof.”

ARIZONA TERRITORY.¹

Compiled laws of the territory from 1864, when the following sections were adopted, to 1877, by John R. Hoyt:

“§ 2126. Every contract for the sale of any goods, chattels, or things in action, for the price of \$100 or over, shall be void, unless, 1st, a note or memorandum of such contract be made in writing, and be subscribed by the parties to be charged forthwith; or, 2d, unless the buyer shall accept or receive part of such goods, or the evidences, or some of them, of such things in action; or, 3d, unless the buyer shall, at the time, pay some part of the purchase money.”

“§ 2127. Whenever any goods shall be sold at auction, and the auctioneer shall, at the time of sale, enter in a sale-book a memorandum specifying the nature and price of the property sold, the terms of the sale, the name of the purchaser, and the name of the person on whose account the sale is made, such memorandum shall be deemed a note of the contract of sale within the meaning of the last section.”

CALIFORNIA.

Codes and statutes compiled by Theo. H. Hittill, 1876, Civil Code, 1872, and Supplement of 1880:

The following contracts are invalid, unless the same, or

¹ Territorial government established February 24, 1863.

some note or memorandum thereof, be in writing, and subscribed by the party to be charged, or by his agent. Paragraph 6624, Civil Code, 1872.

4. An agreement for the sale of goods, chattels, or things in action, at a price not less than \$200, unless the buyer accept or¹ receive part of such goods and chattels, or the evidences, or some of them, of such things in action, or pay at the time some part of the purchase money; but when a sale is made by auction, an entry by the auctioneer in his sale-book, at the time of the sale, of the kind² of property sold, the terms of sale, the price, and the names of the purchaser and person on whose account the sale is made, is a sufficient memorandum.

COLORADO.

General Laws, ch. 39, § 12, subd. 4:

Every contract for the sale of any goods, chattels or things in action, for the price of \$50 or more, shall be void, unless: First, a note or memorandum of such contract be made in writing and be subscribed by the parties to be charged therewith; or, second, unless the buyer shall accept and receive part of such goods, or the evidence of some of them, of such things in action; or, third, unless the buyer shall, at the time, pay some part of the purchase money.

As to sales by auction the statute provides as follows: Whenever goods shall be sold at auction, and the auctioneer shall, at the time of sale, enter in a sale-book a memorandum, specifying the nature and price of the property sold, the terms of the sale, the name of the purchaser and the name of the person for whose account the sale is made, such memorandum shall be deemed a note of the contract of sale within the meaning of the last preceding section.

¹ In Newmark's Code of Civil Procedure, subd. 4 of § 1973, the words "accept *and* receive," instead of "or," are used. the word "kinds" is used; in his compilation of 1876 the word "kind" is used; so, also, in Newmark & Hart's Code.

² In Hittill's Supplement, 1880,

CONNECTICUT.

The statute of frauds of this state, as amended in 1875, reads as follows:

No agreement for the sale of any personal property for \$50 or upwards shall be good, unless the buyer shall accept and actually receive part of the property sold, or give something to bind the bargain, or in part payment, or unless some memorandum in writing of such agreement shall be signed by the parties to be charged therewith or their agents.

The statute, previous to the above amendment, was as follows — General Statutes, 1866, tit. 25, § 2:

No contract for the sale of any goods, wares or merchandise, for the *price of \$35* or upwards, shall be allowed to be good, unless the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or unless some note or memorandum in writing of the said bargain shall be made and signed by the parties to be charged by such contract, or by their agents thereunto lawfully authorized.

DAKOTA TERRITORY.¹

Revised Codes of the territory, 1883, § 920, subd. 4:

The following contracts are invalid unless the same, or some note or memorandum thereof, be in writing and subscribed by the party to be charged, or by his agent:

Subd. 4. An agreement for the sale of goods, chattels or things in action at a price not less than \$50, unless the buyer accept or receive part of such goods and chattels, or the evidences, or some of them, of such things in action, or pay at the time some part of the purchase money; but when a sale is made by auction, an entry by the auctioneer in his sale-book, at the time of the sale, of the kind of property sold, the terms of sale, the price, and the names of

¹ Territorial government established March 2, 1862.

the purchaser and the person on whose account the sale was made, is a sufficient memorandum.

§ 991. No sale of personal property, or agreement to buy or sell it for a price of \$50 or more, is valid, unless:

1. The agreement, or some note or memorandum thereof, be in writing, and subscribed by the party to be charged, or by his agent; or,

2. The buyer accepts and receives part of the things sold, or, when it consists of a thing in action, part of the evidences thereof, or some of them; or,

3. The buyer, at the time of sale, pays a part of the price.

§ 992. An agreement to manufacture a thing from materials furnished by the manufacturer or by another person is not within the provisions of the last section.

The following provision as to sales by auction existed prior to the amendment of 1883; it was passed in 1877:

“Whenever any goods shall be sold at auction and the auctioneer shall, at the time of sale, enter in a sale-book a memorandum specifying the nature and price of the property sold, the terms of the sale, the name of the purchaser and the name of the person on whose account the sale is made, such memorandum shall be deemed a note of the contract of sale within the meaning of the last section.”

FLORIDA.

McClellan's Digest of the Laws, 1881, ch. 29, § 2; Act of November 15, 1828:

No contract for the sale of any personal property, goods, wares or merchandise shall be good unless the buyer shall accept the goods or part of them so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or some *note or memorandum* in writing of the said bargain or contract be made, and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.

GEORGIA.

In February, 1784, an act was passed re-enacting the statute of frauds, 29 Car. II.

The Code of 1882, § 1950, subd. 7, provides:

"To make the following obligations binding on the promisor the promise must be in writing, *signed* by the party to be charged therewith, or some person by him lawfully authorized, viz.:

"Any contract for the sale of goods, wares and merchandise in existence, or not *in esse*, to the amount of \$50 or more, except the buyer shall accept part of the goods sold and actually receive the same, or give something in earnest to bind the bargain, or in part payment."

"The foregoing section does not extend to the following cases, viz.:

"1. Where the contract has been fully executed.

"2. Where there has been performance on one side, accepted by the other in accordance with the contract.

"3. Where there has been such part performance of the contract as would render it a fraud of the party refusing to comply if the court did not compel a performance."¹

§ 2621. No note or memorandum in writing shall be necessary to charge any one at a judicial sale.²

§ 2630. In case of sales by auction, the auctioneer shall be considered agent of both parties, so far as to dispense with any further memorandum in writing than his own entries.

IDAHO TERRITORY.³

The statute of frauds of this territory is the same as New York except that the clause as to sales of chattels is "*two hundred dollars*" instead of "*fifty dollars*."

¹ Irwin's Code, 1867, adopted in 1860, §§ 1940, 1941; Cobb's New Dig., Appendix III.

² Adopted December 26, 1831.

³ Territorial government established March 3, 1863.

INDIANA.

Revised Statutes, 1881; Gavin and Hord's edition of the Statutes, 1862, vol. 1, pp. 348, 351; Act of June 9, 1852, § 7:

§ 4910. No contract for the sale of any goods for the price of \$50 or more shall be valid, unless the purchaser shall receive part of such property, or shall give something in earnest to bind the bargain, or in part payment, or unless some note or memorandum in writing of the bargain be made and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized.

IOWA.

McClain's Annotated Statutes, 1880; Miller's Code of Iowa, vol. 2, p. 865:

§ 3663. Except when otherwise specially provided, no evidence of any of the contracts enumerated in the next succeeding section is competent, unless it be in writing and signed by the party charged or by his lawfully authorized agent.

§ 3664. Such contracts embrace:

1. Those in relation to the sale of personal property, when no part of the property is delivered, and no part of the price is paid.

§ 3665. The provision of the first subdivision of the preceding section, does not apply when the article of personal property sold is not at the time of the contract owned by the vendor and ready for delivery; but labor, skill or money, are necessarily to be expended in producing or procuring the same.

KANSAS.

Compiled Laws, 1879:

§ 1020. All contracts in writing, signed by the party bound thereby or his authorized agent or attorney, shall import a consideration. (In force February 9, 1859.)

§ 3545. In any case founded on contract, where any part of the principal or interest shall have been paid, or an

acknowledgment, or any existing liability, debt or claim, or any promise to pay the same, shall have been made, an action may be brought in such case within the period prescribed for the same, after such payment, acknowledgment or promise; but such acknowledgment or promise must be in writing, signed by the party to be charged thereby. (In force June 1, 1859.)

MAINE.

Revised Statutes, passed August 29, 1883, in force January 1, 1884; Statute of Frauds in force April 1, 1841; Revised Statutes of 1857, ch. 111, § 5:

§ 4. No contract for the sale of any goods, wares or merchandise for \$30 or more shall be valid, unless the purchaser accepts and receives part of the goods, or gives something in earnest to bind the bargain, or in part payment thereof, or some note or memorandum thereof is made and signed by the party to be charged thereby, or by his agent.

MARYLAND.

Alexander's collection of the British Statutes, in force in Maryland, 1870:

Pages 508-512. It has always been understood that the judges under the old government laid it down as a general rule, that all statutes for the administration of justice, whether made before or after the charter (1628), "so far as they were applicable, should be adopted."¹ A clause substantially to the same effect was contained in the third article of the Declaration of Rights adopted in 1776, and has been continued, with slight variations, in every subsequent change of the constitution; accordingly, all the provisions of 29 Car. II., ch. 3, have been regarded as of force within the province and the state, without any legislative re-enactment. The existing constitution, adopted in 1868, contains a clause (article 5) adopting all English statutes in

¹ *Sibley v. Williams*, 3 Gill & v. Pearce, 1 Harris & McH., 29 Johns., 62 (1830); *Green v. Drummond*, 31 Md., 71; *Clayland's Lessee* (1714); *Throop on Val. of Verb. Agreements*, 48.

force on the 4th of July, 1776, which are locally applicable, and which have been introduced, used and practiced by the courts, subject to the action of the legislature of the state.

“XVII” (page 512, Alexander’s British Statutes): “And be it further enacted by the Authority aforesaid, that from and after the said four and twentieth Day of June, no Contract for the Sale of any Goods, Wares and Merchandise, for the Price of ten Pounds *Sterling* or upwards, shall be allowed to be good, except the Buyer shall accept Part of the Goods so sold, and actually receive the same, or give something in earnest to bind the Bargain, or in Part of Payment, or that some Note or *Memorandum* in Writing of the said Bargain be made and signed by the Parties to be charged by such a Contract, or their Agent thereunto lawfully authorized.”

MASSACHUSETTS.

Public Statutes, 1882; General Statutes, revised and passed December 28, 1859, ch. 105, p. 527, § 5:

No contract for the sale of goods, wares, or merchandise, for the price of \$50 or more, shall be good or valid, unless the purchaser accepts and receives part of the goods so sold, or gives something in earnest to bind the bargain, or in part payment; or unless some note or memorandum in writing of the bargain be¹ made and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized.

MICHIGAN.

Annotated Statutes, 1882; Revised Statutes of 1846, p. 327; Compiled Laws, 1872, ch. 167, §§ 3, 4:

4699 (§ 3). No contract for the sale of any goods, wares, or merchandise, for the price of \$50 or more, shall be valid, unless the purchaser shall accept and receive part of the goods sold, or shall give something in earnest to bind the bargain, or in part payment, or unless some note or

¹ Word “is” is used in the Revised Statutes, 1860.

memorandum, in writing, of the bargain, be made and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized.

4700 (§ 4). Whenever any goods shall be sold at auction, and the auctioneer shall, at the time of sale, enter in a sale-book a memorandum specifying the nature and price of the property sold, the terms of the sale, the name of the purchaser, and the name of the person on whose account the sale is made, such memorandum shall be deemed a memorandum of the contract of sale, within the meaning of the last section.

MINNESOTA.

General Statutes, 4th ed., 1883, ch. 41, tit. II, §§ 7 and 8, pp. 542, 548:

§ 7. Every contract for the sale of any goods, chattels or things in action, for the price of \$50 or more, shall be void, unless,

First. A note or memorandum of such contract is made in writing, and subscribed by the parties to be charged therewith; or,

Second. Unless the buyer accepts and receives part of such goods, or the evidences, or some of them, of such things in action; or,

Third. Unless the buyer at the time pays some part of the purchase money.

§ 8. Whenever goods are sold at public auction, and the auctioneer, at the time of sale, enters into a sale-book a memorandum specifying the nature and price of the property sold, the terms of the sale, name of the purchaser, and the name of the person on whose account the sale is made, such memorandum shall be deemed a note of the contract of sale within the meaning of the last section.

MISSOURI.

Revised Statutes, 1879, § 2514, p. 422; General Statutes, 1865, ch. 106, § 6:

“No contract for the sale of goods, wares and merchan-

dise, for the price of \$30 or upwards, shall be allowed to be good, unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or *unless some note or memorandum in writing be made of the bargain*, and signed by the parties to be charged with such contract, or their agents lawfully authorized."

MONTANA TERRITORY.¹

Revised Statutes, 1879, 5th Div., § 160 *et seq.*, passed January 12, 1872:

"Every contract for the sale of any goods, chattels, or things in action, for the price of \$200 and over, shall be void, unless: First, a note or memorandum of such contract be made in writing, and be subscribed by the parties to be charged therewith; or second, unless they shall accept or receive a part of such goods, or the evidences, or some of them, of such [things] in action; third, or, unless the buyer shall at the time pay some part of the purchase money."

"Whenever goods shall be sold at auction, and the auctioneer shall at the time of sale enter in a sale-book a memorandum specifying the nature and price of the property sold, the terms of the sale, the name of the purchaser, and the name of the person on whose account the sale is made, such memorandum shall be deemed a note of the contract of sale within the meaning of the last section."

NEBRASKA.

Compiled Statutes, by Guy A. Brown, ch. 32, §§ 9, 10. [Territorial Statutes, 1855, Part First, parts of §§ 857, 858, 859.]

"Every contract for the sale of any goods, chattels, or things in action, for the price of \$50 or more, shall be void, unless: First, a note or memorandum of such contract be made in writing, and be subscribed by the party to be

¹ Territorial government established May 26, 1864.

charged thereby; or second, unless the buyer shall accept and receive part of such goods, or the evidences, or some of them, of such things in action; or third, unless the buyer shall, at the time, pay some part of the purchase money."

"Whenever goods shall be sold at public auction, and the auctioneer shall, at the time of sale, enter in a sale-book a memorandum specifying the nature and price of the property sold, the terms of the sale, the name of the purchaser, and the name of the person on whose account the sale is made, such memorandum shall be deemed a note of the contract of sale within the meaning of the last section."

Territorial statutes of 1855 read as follows:

"Except when otherwise specially provided, no evidence of any of the contracts enumerated in the next succeeding section is competent, unless it be in writing and signed by the party charged, or by his lawfully authorized agent."

"Such contracts embrace: Those in relation to the sale of personal property when no part of the property is delivered and no part of the price is paid."

"The provision of the first subdivision of the preceding section does not apply when the article of personal property sold is not at the time of the contract owned by the vendor and ready for delivery, but labor, skill or money are necessarily to be expended in producing or procuring the same."

NEVADA.

Compiled Laws, 1873, § 55 *et seq.*; Territorial Statutes, November 5, 1861, ch. IX, §§ 62, 63.

"Every contract for the sale of any goods, chattels, or things in action, for the price of \$50 or over, shall be void, unless: First. A note or memorandum of such contract be made in writing, and be subscribed by the parties to be charged therewith; or, Second. Unless the buyer shall accept or receive part of such goods, or the evidences, or some of them, of such things in action; or, Third. Unless the buyer shall, at the time, pay some part of the purchase money."

"Whenever goods shall be sold at auction, and the auctioneer shall, at the time of the sale, enter in a sale-book a memorandum specifying the nature and price of the property sold, the terms of the sale, the name of the purchaser, and the name of the person on whose account the sale is made, such memorandum shall be deemed a note of the contract of sale within the meaning of the last section."

NEW HAMPSHIRE.

General Laws, 1878, chap. 220, sec. 16; Statute of Frauds of 29 Car. II., except the land clause, in the fourth section, was passed February 10, 1791:

§ 16. No contract for the sale of goods, wares, or merchandise, for the price of \$33, or more, is valid, unless the buyer accepts and actually receives part of the property sold, or gives something in part payment or in earnest to bind the bargain, or unless some note or memorandum thereof is in writing, and signed by the party to be charged, or by some person by him thereto authorized.

NEW JERSEY.

Revised Statutes, revision of 1878, page 445; Act of November 26, 1794, remained in force until January 1, 1875:

§ 6. Every contract for the sale of goods, wares, and merchandise, for the price of \$30 or upwards shall be void; unless (1) a note or memorandum of such contract be made in writing, and signed by the party to be charged thereby or by his agent thereunto lawfully authorized; or (2) unless the buyer shall accept part of the goods so sold, and actually receive the same; or (3) unless the buyer shall give something in earnest to bind the bargain or pay some part of the purchase money.

NEW YORK.

Revised Statutes, chapter VII, part II, title II, went into effect January 1, 1830: 6th ed., edited by Geo. W. Cothran.

§ 3. Every contract for the sale of any *goods, chattels, or*

things in action, for the price of \$50 or more, shall be void, unless,

1. A note or memorandum of such contract be made in writing, and be *subscribed* by the parties to be charged thereby; or,

2. Unless the buyer shall accept and receive part of such goods, or the evidences, or some of them, of such things in action; or,

3. Unless the buyer shall, at the time, pay some part of the purchase money.

§ 4. "Whenever goods shall be sold at public auction, and the auctioneer shall, at the time of sale, enter in a sale-book or memorandum specifying the nature and price of the property sold, the terms of the sale, the name of the purchaser, and the name of the person on whose account the sale is made, such memorandum shall be deemed a note of the contract of sale within the meaning of the last section."

§ 8. Every instrument required by any of the provisions of this title to be subscribed by any party may be subscribed by the lawful agent of such party.

The "Act for the prevention of frauds," passed February 26, 1787, as found in the "Laws of the State of New York," p. 79, corresponds with the seventeenth section of the English statute of frauds.

OREGON.

Code of Civil Procedure, 1862, in force June 1, 1863:

§ 775, subd: 5. In the following cases the agreement is void, unless the same, or some note or memorandum thereof, expressing the consideration, be in writing and *subscribed* by the party to be charged, or by his lawfully authorized agent; evidence, therefore, of the agreement shall not be received other than the writing, or secondary evidence of its contents, in the cases prescribed by law.

§ 5. An agreement for the sale of *personal property* at a price not less than \$50, unless the buyer accept and receive some part of such personal property, or pay at the time

some part of the purchase money; but when the sale is made by auction, an entry by the auctioneer in his sale-book at the time of the sale, of the kind of property sold, the terms of the sale, the price, and the names of the purchaser and person on whose account the sale is made, is a sufficient memorandum.

SOUTH CAROLINA.

General Statutes, 1882, p. 587:

By an act of the province of South Carolina, passed December 12, A. D. 1712, several "statute laws of the kingdom of England or South Britain," therein copied at length, are declared to be in "as full force, power and virtue, as if the same had been specially enacted and made for this province, or as if the same had been made and enacted therein by any general assembly thereof." Among these statutes is the 29th Car. II., ch. 3.

UTAH TERRITORY.¹

Compiled Laws, 1876, § 1010:

The statute of frauds of Utah is identical with that of New York, except that the clause as to the sale of chattels is "three hundred dollars" instead of fifty dollars.

VERMONT.

Revised Statutes, 1880, § 982; General Statutes of 1863, ch. 66, § 2:

No contract for the sale of goods, wares or merchandise, for the price of \$40 or more, shall be valid, unless the purchaser accepts and receives part of the goods so sold, or gives something in earnest to bind the bargain, or in part payment, or unless some note or memorandum of the bargain is made in writing, and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized.

¹ Territorial government established September 9, 1850.

WASHINGTON TERRITORY.¹

Laws of 1853, pp. 355, 380; Code 1881, § 2326:

No contract for the sale of any goods, wares, or merchandise, for the price of \$50 or more, shall be good and valid unless the purchaser shall accept and receive part of the goods so sold, or shall give something in earnest to bind the bargain, or in part payment, or unless some note or memorandum in writing of the bargain be made and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized.

WISCONSIN.

Revised Statutes of 1858, ch. 107, §§ 3 and 4; Revised Statutes of 1878, §§ 2308, 2309 and 2327.

Every contract for the sale of any goods, chattels or things in action, for the price of \$50 or more, shall be void unless:

1. A note or memorandum of such contract be made in writing, and be subscribed by the parties to be charged therewith; or

2. Unless the buyer shall accept and receive part of such goods, or the evidences, or some of them, of such things in action; or

3. Unless the buyer shall at the time pay some part of the purchase money.

Whenever goods shall be sold at public auction, and the auctioneer shall at the time of the sale enter in a sale-book a memorandum specifying the nature and price of the property sold, the terms of the sale, the name of the purchaser and the name of the person for whose account the sale is made, such memorandum shall be deemed a note of the contract of sale within the meaning of the last section.

¹ Territorial government established March 2, 1853.

§ 2327. Every instrument required under any of the provisions of this title to be subscribed by any party, may be subscribed by the agent of such party lawfully authorized thereto.

WYOMING TERRITORY.¹

Revised Statutes, 1887; Compiled Laws, 1876 (by J. R. Whitehead), ch. 57, § 2, page 358:

Every contract for the sale of any goods, chattels or things in action, for the price of \$50 or more, shall be void, unless: *First*, a note or memorandum of such contract be made in writing and be subscribed by the party to be charged thereby; or, *second*, unless the buyer shall accept and receive part of such goods, or the evidences, or some of them, of such things in action; or *third*, unless the buyer shall at the time pay some part of the purchase money.

¹ Territorial government established July 25, 1868.

APPENDIX II.

Section 17 of the Statute of Frauds, 29 Car. II. (A. D. 1677), as contained in the fifth volume of the "Statutes of the Realm," published in London, in 1819, reads as follows (*verbatim et literatim*):

XVII. "And bee it further enacted by the authority afore-said That from and after the said fower and twentyeth day of June noe Contract for the Sale of any Goods Wares or Merchandises for the price of ten pounds Sterling or upwards shall be allowed to be good except the Buyer shall accept part of the Goods soe sold and actually receive the same or give something in earnest to bind the bargaine or in part of payment, or that some Note or Memorandum in writing of the said bargaine be made and signed by the partyes to be charged by such Contract or their Agents thereunto lawfully authorized."

LORD TENTERDEN'S ACT.

19 George IV., May 9, 1828.

EXTRACTS FROM.

"AN Act for rendering a written memorandum necessary to the validity of certain promises and engagements."

§ 7. "And whereas, by an act passed in England in the twenty-ninth year of the reign of King Charles the Second, entitled 'An act for the prevention of frauds and perjuries,' it is among other things enacted, that from and after the 24th day of June, 1677, no contract for the sale of any goods, wares and merchandises for the price of £10 or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the bargain, or

in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized; and whereas a similar enactment is contained in an act passed in Ireland in the seventh year of the reign of King William the Third; and whereas it has been held that the said recited enactments do not extend to certain executory contracts for the sale of goods, which nevertheless are within the mischief thereby intended to be remedied; and it is expedient to extend the said enactments to such executory contracts:

“BE IT ENACTED, that the said enactment shall extend to all contracts for the sale of goods of the *value* of £10 and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery.”

INDEX.

[REFERENCES ARE TO SECTIONS.]

ABBOTT, C. J.

opinion of, as to successive sales falling within the statute of frauds, 236.

ABBREVIATIONS.

in telegrams, may be explained, 459.

or in a letter or memorandum, 459.

(See TELEGRAPH, CONTRACTS BY.)

ACCEPTANCE OF GOODS.

meaning of acceptance, 244, 246, 250, 318, 323.

statute of frauds as to acceptance, 244, 247, 272.

acceptance sufficient, when, 61, 287.

an early case on the subject, 21, n. 1.

acceptance necessary, of anything built or manufactured, 31.

or delivered under a verbal contract, 292, 295.

in sales of goods, 47, 113, 245, 276, n. 2.

Stone, A. W., J., opinion of, on acceptance, 295.

acceptance implied, when, 185, 282*a*, 283, n. 2.

right to refuse to accept, 109, 167, 282.

in bargain for a chattel, 93.

case of *Grafton v. Armitage* distinguished, 93.

acceptance of a crop of tobacco, 164.

acceptance waives question of certain work, when, 123.

waives defects, when, 123.

statute of frauds of the several states as to acceptance, 245.

variance in phraseology as to, 245.

acceptance and receipt of goods necessary, 245, 248, 268.

may be by whom, 281.

"accept," the word does not appear in the Iowa statute, 245, n. 6.

the word "delivered" used in place of, 245, n. 6.

sufficient to guard against fraud, 245, n. 6.

accepting and receiving, distinction between, 246.

where purchaser refuses to allow the goods to remain in his place, 322.

acceptance must be unconditional, 247, 260, 280.

words not sufficient, 250, 253, 254, 255.

ACCEPTANCE OF GOODS — continued.

- physical acts necessary, 247, 250, 253, 254, 255, 266, 268, 271.
- to constitute acceptance vendee must receive the goods as owner, 248, 250, 251, 263, 269.
- his right to inspect goods after they are delivered, 282.
- must be such as to preclude objection to quantum and quality, 248, 254, 263, 267, 268, 270, 282.
- and free from seller's lien, 272.
- the case, *Ex parte Safford*, *Re Downing*, 249.
- where goods are set aside by vendee, 249.
- Lowell, J., opinion of, as to what constitutes acceptance and receipt, 249.
- distinction between, 249, 314.
- where circumstances indicate, 249.
- in case of receipt without acceptance, 325.
- Learned, P. J., opinion of, on acceptance and receipt, 250.
- acceptance may be before or after receipt, 250, 253, 260, 261, 276, 316.
- intention, as an element of acceptance, 250, 252, 254, 256, 267, 269, 282a.
- acceptance not inferred from the fact that goods came to possession of vendee, 250, 270, 274, 282, 325.
- may be inferred from circumstances, 253, 278, 282, 282a.
- effect of acknowledgment of vendee to a third person that he purchased the goods, 251.
- case of *Gilman v. Hill*, on acceptance within the statute, 252, 254, 256.
- Eastman, J., opinion of, as to acceptance, 252.
- acceptance validates contract, although the work was done by another than the person employed, 123.
- constructive acceptance sufficient, 253, 254, 255, n. 1, 271.
- court to pass upon, 256.
- what is sufficient evidence of, 252, 262, 267.
- test of constructive acceptance, 271.
- what will amount to acceptance, 253, 254, 263, 272, 274.
- case of *Gardet v. Belknap*, 254.
- words insufficient to constitute acceptance; illustration, 254, 255, 278.
- case of *Shindler v. Houston*, as to what is an acceptance, 255.
- acceptance a question of law, when, 257.
- may depend upon the conclusion of the jury, 257, 263.
- embarrassments of the court in determining the question, 258.
- acceptance validates a void contract, 277.
- acceptance of part of the goods, effect of, 258, 260, 268, 281, 318.
- when an entire contract, acceptance of part is acceptance of whole, 268a.

ACCEPTANCE OF GOODS—continued.

- does not preclude vendee from objecting to, 258.
- in executory contracts, rule as to, 258, 262.
- in purchase by order or sample, 258.
- using part of goods, option of purchaser, 259, 279.
- when there has been part payment, 295.
- exercise of option to accept, 259, 279.
- exercise of ownership, 263.
- invoice sent and returned, no evidence of acceptance, 259, 280.
- nor where goods are sent to the vendee, 274.
 - acceptance under the New York statute of frauds, 261.
 - conflict of authority as to when goods must be accepted, 261.
 - case of *McKnight v. Dunlap*, as to acceptance, 261.
 - Paige, J., opinion of, as to time of acceptance, 261.
 - proposition and acceptance, distinction, 261.
 - acceptance validates an inoperative contract, 261, n. 4, 277.
- bailee; vendor may hold goods as bailee of vendee, 262, 263, 264, 266, 273.
- what will and what will not amount to an acceptance in such case, 262, 265, 273.
- case of *Rappleye v. Adee*, where mark of purchaser is put upon chattels, 262, 263.
- where a part of the goods are delivered under a verbal contract, 279.
- vendor may act as agent of vendee in selling goods, 263.
- case of *Lansing v. Turner*, where goods remained in vendor's store after purchase, 264.
- where consideration is paid, property vests in vendee, 264.
- an example from Blackstone, 264.
- change of possession, when complete, 263, 265, 267.
 - oral contract, what will not amount to an acceptance under;
 - case of *Tempest v. Fitzgerald*, 266, 268.
 - parol purchase of an animal to be taken away in a few days and it dies meantime, no acceptance, 266, 269.
 - Park, J., opinion of, as to acts necessary to show acceptance, 266, 267.
 - parol contract for sale of a horse, and seller borrows it for a time, sufficient evidence of acceptance, 267.
- acceptance of a wagon coupled with a condition, 274.
- what will amount to an acceptance of goods; case of *Atherton v. Newhall*, 268.
- Gray, C. J., opinion of, on the subject of acceptance sufficient to satisfy the statute of frauds, 268.
- acceptance may be by whom, 268, 281.
- notice of non-acceptance, effect of, 268, 279, 280, 322.
 - case of *Cooke v. Millard*, on acceptance, necessary to bind the vendee, under an executory contract, 269, 277.

ACCEPTANCE OF GOODS — continued.

- Dwight, C., opinion of, on acceptance, and where goods are set apart, 269.
- assent of parties necessary to selection of goods, 270.
- vendor may select goods for vendee, 270, 281.
- where sale involves weight or measure, 269.
- vendee's implied authority that vendor select goods, 270.
- not an acceptance in such case, when, 281.
- goods put in a deliverable condition does not pass title, 270.
- storage of goods by seller does not imply acceptance by buyer, 271.
 - order for goods void until acceptance, 271, 280.
 - offer of purchase is subject to dissent, 316.
 - case of *Clarke v. Labreche*, 271.
 - correspondence may show acceptance*, 271.
 - Blodgett, J., opinion of, on the subject, 271.
 - involving constructive acceptance, 271.
 - storage of the goods, effect of, 271.
- removal of goods to a place appointed by the buyer does not amount to an acceptance, 271.
- marking goods does not, 307.
- nor where the seller holds dominion over the goods, 272.
- nor where the seller has a lien on the goods, 272.
- "accepts and receives,"* words of the California statute of frauds, 275.
 - instance of non-acceptance, and reasons for, 275, 279.
 - acceptance and delivery, example of, 276.
 - acceptance of a specific chattel, 276.
 - where there is acceptance of the part delivered, 317.
 - void contract validated by acceptance, 277.
- acceptance of more goods than were bought will take case out of the statute of frauds, 277.
- receipt without acceptance, instance of, 325.
- case of *Amson v. Dreher*, as to what is sufficient evidence of acceptance, 277, 315.
- test applied, 310.
- bill of lading sent, a circumstance, how far evidence of, 277, 278.
 - Cooley, C. J., opinion of, on acceptance, 279.
 - promise not in writing, instance of, 279.
- no acceptance, where goods were ordered and invoice sent and returned with objections, 280.
- or where goods are lost, when, 462.
- deductions upon questions of acceptance, 281.
- vendee selling the goods without inspection is tantamount to acceptance of them, 282.
- insurance of goods by vendee is not an acceptance, 282.
- reasonable time, goods not accepted should be rejected within, 282.

ACCEPTANCE OF GOODS — continued.

- usage may govern as to right of rejection of goods, 282*a*.
- delay in rejecting goods will work an acceptance, when, 282*a*.
 - acceptance by symbolical delivery of goods, 331.
 - of sample as part of bulk, 309, 310.
 - of offer by telegraph, 456.
- an acceptance may satisfy the statute, yet not preclude vendee from rejecting the goods, 318, 321.
- or putting in evidence as to the terms of the contract, 310.
- acceptance, notwithstanding immediate notice sent that goods are not like sample, 319.
- acceptance, when terms of contract not complied with, 310.
- acceptance to let in parol evidence, different from acceptance of fulfillment of contract, 317.
- acceptance found, where goods were sold by sample, and resold by buyer before delivery to him, 317.
- acceptance and receipt, distinction between, in goods sold by sample, 314.
 - where the acceptance was not sufficient, an attachment held, 278.
- (See RECEIPT AND DELIVERY.)

ACTION.

- what is the cause of action, 73.
- where work ends in nothing that can be the subject of a sale, action cannot be for goods sold and delivered, 88.
- for non-acceptance, 92, 93, 279.
 - action not maintainable for damages until acceptance, 275.
- action is to be brought by party on whose account an auction sale is made, 535.
 - when action for goods sold cannot be maintained, 38.
- action for goods sold and delivered, 93.
 - breach of contract to manufacture, action for, 101.
 - special action on the case, when, 112.

AGENT LAWFULLY AUTHORIZED TO SIGN.

- agent, definition of, 485.
 - the word agent includes general or special brokers, factors and auctioneers, 485.
 - statute of frauds of the several states as to agent, recapitulation of, 486.
- authority and power of an agent in general, 108, 485.
- rules applicable to acts of principal apply to acts of agent, 487.
- signature of agent is the signature of the principal, 489.
- agent of one or both parties, effect of, 487.
- agent's contract for the manufacture of goods, 97.
- agent's authority may be proved by parol, 485, 487.

AGENT LAWFULLY AUTHORIZED TO SIGN — continued.

agent may sign a memorandum and bind his principal, 435, 485, 486, 487, 489, 490, 492.

he may receive payment for his principal, 389.

as to ratification of agent's authority, 485.

agent signing memorandum for his own use, principal not bound, 492, n. 3.

agent may accept goods, when, 280.

agent may be a witness, when, 487.

agent's contract by telegraph, 462.

case of *Wiener v. Whipple*, as to acts of agent to bind his principal, 489.

agent's memorandum; example of sufficiency of, 490, 492.

agent's entry in a memorandum book in presence of the parties, effect of, 490.

memorandum made and not signed, statute is not satisfied, 491, parol proof inadmissible to explain substance of the writing in a memorandum, 502.

agent specially authorized, 472, 488.

acts of a special agent will bind his principal, 472.

special power in agent cannot bind his principal if he exceed his authority, 488.

if agent exceeds his special authority he is personally liable, 488.

personally liable where name of his principal is not disclosed, 435, 492.

example of, 492.

personally bound in sale of stock in such case, 492.

agent liable for loss where he makes a contract without disclosing the name of his principal, 492.

principal liable for acts of agent when he has reaped the benefit of contract, 435.

brokers, definition of, 493.

a broker is a middleman, 493.

he acts in the name of his principal, 493.

power of broker generally, 494.

broker for both parties, when, 487.

a broker for both parties may bind them, 495, 496.

presumption that a broker is agent of both parties may be rebutted, 495, 496.

of contract of purchase by, 474, 494, 500.

contract to buy and sell stocks for another is without the statute, 133.

when does property pass in such contracts, 494.

no effect goes out of the broker; his signature has no effect as his own, 494.

AGENT LAWFULLY AUTHORIZED TO SIGN — continued.

- signature of a broker generally, 474.
- broker has no possession of the goods bought or sold, 494.
 - he has no control over the delivery of goods sold, 494.
 - memorandum of, 474, 498, 500.
 - case of *Newberry v. Wall*, as to a broker's memorandum, 498.
 - broker's memorandum in his book, effect of, 498.
 - memorandum of the purchaser's broker is binding, although his name does not appear therein, 500.
 - case of *Dykens v. Townsend*, as to a broker's memorandum, 500.
 - broker's entry in his book not signed by either party is not binding, 501.
 - parties who have not signed not bound, 501.
 - Kent, C. J., opinion of, upon the sufficiency of a broker's memorandum, 502.
- memorandum of seller shown to broker, effect of, 502.
- memorandum comprised in entry of a party and of the broker, 502.
- memorandum of broker, when too vague, 502.
- what the memorandum must contain, 502.
- case of *Bailey v. Ogden*, as to broker's memorandum, 502.
- broker's bought and sold note*, memorandum in, 496.
 - delivery of bought and sold note to the respective parties constitutes a valid contract, 496.
 - entry of sale by broker in his book, 496.
 - evidence of the contract, 496.
 - is the entry by a broker in his book of a sale binding on the parties where no sale-note is delivered, 497.
 - case of *Coddington v. Goddard*, as to broker's entry, 497.
 - broker's entry in his sale book sufficient if the names of the parties and the terms of the contract appear, 497.
- if different notes be delivered to the parties by the broker there is no binding contract, 496.
- a valid contract is made if the broker deliver the same note to the respective parties, 498.
- effect of notice of execution of a broker's note, 499.
- example of a bought and sold note, 498.
- sale of goods to arrive, made by broker, 498.
- a bought-note delivered by the broker to the purchaser, the purchaser is bound, 499.
- what is sufficient evidence of such delivery, 499.
 - where party refuses to accept goods after a contract has been made by a broker, 499.

AGENT LAWFULLY AUTHORIZED TO SIGN — continued.

what will amount to a delivery and acceptance of goods under a broker's contract, 499.

(See MEMORANDUM IN WRITING.)

AGREEMENT.

word "agreement" does not appear in section seventeen, 3.

there must be a *quid pro quo* in agreements, 17.

word in section 4 requires stricter construction than word "bargain," in seventeenth section, 26.

agreement with a workman to put materials together, not a contract of sale, 31.

agreement in part valid and in part void may be enforced *pro tanto*, 107.

ALLOWED TO BE GOOD.

words "allowed to be good," in the statute of frauds, criticised and construed, 10, 402.

AMES, J.

opinion of, as to shares of stock falling within the statute, 150.

APPENDIX.

I. Statute of frauds of the several states and territories, in relation to sales of goods, wares and merchandise, chattels and things in action, and personal property generally.

II. English statute of frauds, section 17, as to the sale of goods, wares and merchandises.

Lord Tenterden's Act, in relation to executory contracts and as part of the statute of frauds.

AUCTION AND AUCTIONEERS.

of sales by auction, 18, 518.

are not a warranty of title, 546.

meaning of, 515.

auctions in early times, 515.

Dutch custom in auction sales, 515.

doubts expressed at one time whether auction sales were within the statute of frauds, 18.

formerly held not to be within the statute, 18.

that such sales precluded the possibility of perjury, 18.

Lord Mansfield, on sales by auction, 18.

Lord Ellenborough, on auction sales: his criticism of Lord Mansfield's views, 18.

sales by auction founded upon mutuality, 515.

statute of the several states as to auction sales, 517.

AUCTION AND AUCTIONEERS — continued.

- Arizona, California, Colorado, Dakota, Georgia, Idaho, Minnesota, Montana, Nebraska, Nevada, New York and Wisconsin, statute of, as to sales by auction, and what deemed a sufficient memorandum in, 517, 517, n. 1, 517, n. 2.
- statute of frauds in general applies to auction sales, 517, 518, 567.
- memorandum necessary in sales by auction, 18, 517, 517, n. 2, 521, 581.
- auction sale, description of an, 519.
- early case in South Carolina, as to manner of an auction, 519.
- early case in Massachusetts, as to sales by auction, 520.
- Parker, C. J., opinion of, as to auction sales being within the statute, 520.
- common law is not applicable to auction sales where the statute prevails, 569.
- Savage, J., opinion of, upon auction sales, 521, 525.
- construction of the statute as to, 527, 545.
 - what the memorandum to contain, 523, 524, 525.
 - "terms" of sale to appear, 531.
 - "parties" must be named or described, 523, 526, 528, 542.
 - "price" must be stated, 531, 553.
 - defective memorandum, example of, 526, 526, n. 2, 528, 535.
 - partial memorandum insufficient, 545.
 - case of *Hicks v. Whitmore*, as to memorandum, 526.
 - memorandum to be made in a sale-book, 526.
 - must be "at the time" of the sale, 528, 529, 531.
 - "during the day" not sufficient, 528.
 - "point of time," in making, material, 528.
 - strictly construed, statute is as to auction sales, 530, 531, 545.
 - intention of the legislature as to, 531.
 - requisites of the statute, as to auction sales, 530.
- Story, J., opinion of, upon auction sales, 532.
- auction sale running through several days, what necessary as to the memorandum, 538, 541.
- what a sufficient compliance with the statute, 538.
- deductions from the cases as to auction sales, 581.
- when is a sale by auction consummated, 540, 572.
 - principle governing auction sales, 541.
 - sale at auction "an entire contract," 235, 541, 541, n. 3, 542.
- Nelson, C. J., opinion of, as to different purchases at auction, 542.
- when each parcel sold by auction a separate sale, 541.
- when entered separately, 538.
- governed by the same rules as other sales, 541.

AUCTION AND AUCTIONEERS — continued.

- statute applies, where several successive parcels sold exceed the sum mentioned in the statute, 235, 541.
- part delivery takes the case out of the statute, 541, n. 3. 542.
 - description of seller*, what sufficient, 543.
 - must be clearly indicated in memorandum, 543.
 - "the proprietor," words of description, sufficient, 543.
 - "on the part of the vendor," words insufficient, 543.
 - owner's name must be disclosed at the sale, reasons why, 542.
 - when in the catalogue, 542.
 - when not disclosed, 546.
 - when a party holds himself out as owner, when in fact he is simply agent, liable, 542.
 - principal bound, where agent buys goods at auction, when, 546, n. 1.
 - subsequent writings by the seller will cure certain omissions, when, 545.
 - sales are governed by what is said by auctioneer, 546.
- "no contract of sale," by auction, when, 550.
- unless with bidder's consent, 550.
- when taking down bidder's name is not a signing, 550.
- when may the remedy be taken against a purchaser for not complying with an auction sale, 551.
- misrepresentation at an auction sale will render the sale void, 557, 558.
- court of equity will set aside a sale induced by misrepresentation, 566.
- in case of fraud the sale is void, 558.
- one party to a contract cannot sign for the other, 535.
- parol evidence may be introduced to apply the document to the subject, 523.
- but not to show the intention of the parties, 524.
- trustee, as auctioneer, cannot bind the purchaser, 535.
- conditions in sale by auction, what are*, 18, 549.
- sale-book must state particulars of sale, 529, 546.
- conditions must be entered in, 552.
- instance of a material omission, 529.
- as to conditions, sale governed by what is said by auctioneer, 546.
- conditions must be made known at the sale, 549.
- as to retraction of bid, mentioned in the conditions, 549.
- what conditions violate the statute, 549.
- when is the bidder not bound by, 566.
- case of *Jones v. Nanney*, as to retracting a bid, contrary to conditions, 550.

AUCTION AND AUCTIONEERS — continued.

- example of different conditions, 549, n. 3.
- where a sale is suspended, and resumed same day, and bids continue, 550.
- a purchaser not bound, not liable to pay anything, 550.
- conditions; when may remedy be taken against a purchaser for not complying with, 551.
- when is purchaser bound by the conditions, 552.
- conditions, announced contrary to the written conditions, shown by parol proof, 551.
- special conditions*; purchaser bound by, although he did not see them, when, 552.
- catalogue; where auctioneer's clerk signs a ledger in which chattels are specified differently from, sale void, 553.
- condition, where the "highest bidder to be the purchaser," effect of, 559.
- condition, "without reserve," meaning and effect of, 562.
- goods are to be sold whether they bring the value or not, 562.
- "positive sale," condition as to, rule in such case, 562.
- special conditions, 552.
- parol evidence to show conditions of sale, 551.
- "*sample*," sale of goods by, at auction, 18.
- when sample deemed part of the bulk, 18.
- a sale by sample at an auction, illustration of, 529.
- requisites of such a sale, 529.
- instance of a material omission in the sale-book, 529.
- custom of allowance for such goods as do not correspond with sample, 529.
- inspection of goods sold by sample, 529.
- instance of sale by auction of goods by sample, in parcels, 542.
- sale of standing corn at auction, purchaser entitled to gather and carry it away, 546.
- pew*, sale of, by auction, 525.
- statute of frauds applies to sale of pews, 525.
- where part of the name is omitted in the entry in sale of, 525.
- consideration*, contract void for want of, when, 554.
- nudum pactum*, what contract is, 554.
- contract to buy "on joint account" at an auction sale, within the statute, 555.
- where two parties agree to divide the profits of goods bought at auction, one agreeing not to bid against the other, is void, 554.
- "stolen goods" sold at auction pass no title, 563.
- Nelson, C. J., opinion of, upon sale by auction of stolen goods, 563.
- owner presents the better title, as between him and the purchaser of stolen goods, 563.

AUCTION AND AUCTIONEERS — continued.

- who entitled to the property in such case, 563.
- bidder at an auction sale*, 540.
 - his consent necessary, 540.
 - otherwise sale is not consummated, 550.
 - when taking down the bidder's name is not a signing, 550.
 - public policy; it is against, for persons to agree not to bid against each other, 554, 556, 559.
 - fraudulent intent, necessary to render joint bidding void, 555.
 - joint bidding*, when the object is to depress and chill the sale, is void, 555.
 - joint bidding may be valid, when, 555, 557.
 - rules not as strict in auction sales as sales in chancery, 555.
 - puffers and by-bidders*, unlawfulness of, 556, 559.
 - "highest real bidder," the principle of auction sales implied, 556, 558.
 - he is not bound if there has been by-bidding, 556, 558, 559.
 - owner may employ bidders to prevent property from being sacrificed, when, 557, 558.
- employment of bidders*, fraudulent or not, according to circumstances, 557.
- bidders at an auction must be real and sincere, 557, 558.
- Kent, Chancellor, opinion of, upon by-bidding and employment of bidders, 557.
- case of a sale being declared void on account of by-bidding, 559.
- owner may limit the price, 557.
- sale void, if fraudulent means be adopted by a creditor to secure the goods, 557, n. 5.
- custom may govern the conduct of auction sales, 558.
- misrepresentation of the character of the goods will vitiate the sale, 558.
- same general rules apply to sales of personalty as to sales of realty at auction, 559, 561.
- how far may an auctioneer bid*, 559.
- where auctioneer and agent of owner bid, and defendant bids and property is knocked down to him, sale void, 559.
- sale valid when real bid precedes that of the bid at which the property is knocked down, though a puffer had bid, 560.
- highest bid preceding that of a puffer's, sale voidable, 560.
- a sale where a puffer has bid should be void, 560.
- Smith, J., opinion of, on puffers, 561.
- a court of equity will not justify by-bidding, 561.
- a purchaser released from purchase, when, 561.
- a bid may be declined*, 564.
- when may a bid be declined, 564.
- bid of a minor, may be, 564.

AUCTION AND AUCTIONEERS — continued.

- so also a bid of a lunatic, 564.
- or of an irresponsible person, 564.
- question of good morals, where goods sold at auction at less than their real value, 558.
- Sceavola's opinion on the subject, 558.
- auctioneers, their duties and liabilities.*
 - who is an auctioneer, 516.
 - as an agent, 517, 522.
 - his agency defined, 540.
 - auctioneers formerly called brokers, 516, n. 1.
 - agent for both parties, when, 528, 532.
 - agent for the vendor, 530, 532, 533, 567.
 - character as agent, 540.
 - character of employment, 527.
 - authority of an auctioneer, 516, 550, n. 1, 571
 - is the auctioneer agent of the buyer, 532, 533.
 - agency of auctioneer, exists when, 522, n. 1, 528, 571.
 - authority to write down the purchaser's name, when, 522, 528.
 - he is the channel through which the contract is made, 540.
 - agency of the auctioneer ceases if statute violated, 530.
 - of the skill required by an auctioneer, 527.
 - law of agency generally applies, 530.
 - auctioneer to exercise ordinary skill, 527.
 - liable for gross negligence, 527.
 - auctioneer, a disinterested party, 532.
 - but he has an interest in the sale made, 540.
 - is agent of vendor until hammer is knocked down, 533.
 - auctioneer's clerk, agent of buyer, when, 535, 536, 539.*
 - he may make the entry of sale, 536, 537, 575.
 - he has not the same authority as the auctioneer to sign the entry, 537.
 - auctioneer must sign the entry in his book, 561.
 - signature of clerk sufficient, when, 537, n. 4.
 - case of *Price v. Durin*, involving the question where clerk of auctioneer made the entries, held sufficient, 538.
 - name of purchaser to be called out by auctioneer's clerk, 537.
 - agent contemplated by the statute, who is, 535.
 - a clerk of the vendor may make the entry and bind vendee, 535.
 - but the owner of property, himself the auctioneer, cannot, 534.
- memorandum of auctioneer, 18, 528.*
 - must be complete as to the particulars of the sale, 18.
 - he must sign the entry, 523.
 - entry must refer to the terms, 428.
 - price, entry must show the, 531.
 - it must show the seller's and buyer's names, 523, 524, 526, 528, 543.

AUCTION AND AUCTIONEERS — continued.

- sale-book of auctioneer* where entries made, 526.
- when is the entry to be made, 529.
- memorandum must be made in his sale-book, 526.
- example of a defective memorandum, 526, 526, n. 2, 545.
- insufficient, when, 528, 535.
- auction sales must be made in sedulous compliance with the statute, 527, 570.
- must show on whose account sale is made, 528, 543.
- memorandum must be as comprehensive as in other sales, 528.
- certain omissions may be cured, 545.
- memorandum may be made in pencil, 529.
- signature of the auctioneer, 522, n. 1.
- entry must be made immediately on completion of the sale, 529, 581.
- "during the day," insufficient, 528.
- "one hour after the sale." insufficient, 528.
- must not be left to memory, 531.
- as to point of time in making the memorandum, 528.
- "at the time," entry must be made, 530, 532, 575, 581.
- Shaw, C. J., opinion of, as to signing "on the spot," 575, 576.
- reason of the requirement, 530, 575, 581.
- statute prescribes how the auctioneer is to bind the parties, 530.
- case of *Gill v. Bicknell* as to auction sales and entry, 575.
- auctioneer a person "lawfully authorized" to sign the memorandum, 534, 536, 537.
- a description of seller necessary, 543.
- "do," or "ditto," not a sufficient description, 544.
- statute is not satisfied as to name of purchaser, where the auctioneer wrote "do" under a name, 544.
- agent's name entered will satisfy the statute, 526.
- a defective memorandum may be cured by subsequent writings of the seller, 545.
- memorandum sufficient, where auctioneer signs in his own name, 547.
- contract not complete until memorandum signed, 572.
- the bid authorizes the auctioneer to write down the name, 550, n. 1.
- highest bidder not bound until memorandum subscribed, 581.
- conditions, auctioneer must enter the conditions of the sale in his sale-book, 552.
- if he violates the conditions in the sale he becomes personally liable, 562.
- liabilities of the auctioneer*, 527, 547, 548, 562.
- liable for gross negligence, 527.

AUCTION AND AUCTIONEERS — continued.

for omission to comply with the statute, 527.

personally liable, when, 547, 548.

contract signed by auctioneer individually binds him, 547.

if auctioneer omits to write down the name of a bidder and the article is sold at a less price, he is liable, 548.

example, case of *Townsend v. Van Tassel*, 548.

auctioneer liable to real owner of stolen goods sold at auction, 563.

liable when property is sold "without reserve," and conditions violated, 562.

same rule applies as to "positive sales," 562.

not liable for not selling certain goods advertised, 565.

case of *Harris v. Nickerson*, as to auctioneer's liability, 565.

action for loss of time and expense in attending an auction where goods advertised to be sold are not sold will not lie, 565.

Blackburn, J., opinion of on that subject, 565.

auctioneer not bound to give notice of withdrawal of goods, 565.

auctioneer may maintain action, when, 531, 539.

agency, when a party acts for himself at an auction, 533.

agent will be regarded as owner at auction sale, when, 542.

when he holds himself out as owner, 542.

rule requiring agent to sign name of principal, 547.

caption, in auctioneer's sale-book, effect of, 538.

not necessary to be rewritten by the auctioneer at each sale made, 538.

sufficient compliance with the statute where auction continues several days, what is, 538.

bidder at an auction.

who is the highest bidder, 567.

an offer, a bid at an auction is, 567, 570, 572.

"affirmative answer," a bid is, 575.

the bidder regarded as purchaser, when, 569, 572.

a contract at an auction is consummated when the auctioneer has made the entry in his sale-book, 569, 572, 575, 578, 581.

with the bidder's consent, if in accordance with the statute, 567, 572, 578.

entry must be made immediately, 581.

auctioneer may take a higher bid after the hammer has been knocked down, 581.

auctioneer cannot take a higher bid after hammer falls, when, 569.

AUCTION AND AUCTIONEERS — continued.

acceptance of an offer signified by the knocking down of the hammer, 567, 570.

“your offer is accepted,” is signified by the hammer being knocked down, 569, 570.

bidder's contract, Blackburn, J., opinion of, 567.

the bidder makes the contract and authorizes the auctioneer to sign for him, 567, 569.

knocking down the hammer signifies consent to the sale, 568.

auctioneer accepts a bid as agent of the vendor, 567, 577.

words insufficient to make a valid contract, 579.

auctioneer's memorandum constitutes the contract, 576.

mutuality of parties necessary to constitute a valid sale, 567, 572.

it must co-exist at the same moment of time, 574.

when is the bidder bound, 570.

retraction of a bid, 567, 572.

when may the bidder retract his bid, 568, 570, 573, 577.

may the bidder retract his bid after the fall of the hammer, 570.

acceptance, when, at sales by auction, 572.

withdrawal of an offer before acceptance, what, 572.

an agent's authority may be countermanded at any time before the contract is made, 573.

notwithstanding the agent has entered into a verbal agreement his authority may be countermanded, 573.

same principles attach to auction sales, 573.

principal not bound if agent signs a contract against his authority, 573, n. 3.

a proposal may be withdrawn before it has become enforceable by law, 574.

under the common law an offer and acceptance of it is binding, not so under the statute, 574.

sale at auction not complete until when, 574.

bidder not bound, when, 567, 570.

bidder authorizes auctioneer to sign for him, when, 569.

caption; when name of buyer written under improper caption, not bound, 575.

sale-book of auctioneer, 569.

signature of auctioneer necessary, 569.

lawfully authorized to sign, 570.

auctioneer cannot sign against purchaser's objection, and reasons why, 570.

conditions against retracting bid not enforceable, 570, n. 2.

if principal refuse to sign, auctioneer has no right to, 570.

authority of auctioneer to sign must exist at the time of sale, 570.

AUCTION AND AUCTIONEERS — continued.

after bidder retracts his bid auctioneer cannot sign for him, 570.

retraction of a bid, when, 572.

can bidder revoke his bid after hammer falls, 571, 572.

test, whether the knocking down of the hammer or the making and signing of the memorandum constitutes the contract, 570, 571.

before necessary entry is made there is no binding contract, 572, 577.

if agent signs after refusal of principal to take the goods, principal not bound, 573, n. 3.

case of *Ecroyd v. Davis*, as to retraction of a bid, 577.

auctioneer signing name of bidder against his consent, contract not binding, 577.

implied authority of auctioneer to sign for purchaser is revocable at any time before signing, 577, 581.

act of auctioneer's signing, not the knocking down of the hammer, binds the purchaser, 579.

purchaser bound when auctioneer has made proper entry, 578.

"time for repentance" remains, and a sale is not perfect until the auctioneer has written the name of the purchaser in his sale-book in compliance with the statute, 578, 581.

case of *Pike v. Balch*, as to when a sale by auction is complete, 578, 579.

bidder may retract his bid before memorandum signed, 581.

bidder not bound if entry is not immediately made, 581.

bidder's name, taken down before the knocking down of the hammer, does not bind him unless he adopts it, 580.

ratification of acts of auctioneer necessary, when, 580.

mistake in regard to price will relieve purchaser, 579.

AUTHORSHIP OF THE STATUTE OF FRAUDS.

Sir Leoline Jenkins said to have prepared the statute, 5, 7, 8.

he prepared sections as to wills, 7.

Sir Matthew Hale drew the statute, 5.

Lord Nottingham assisted in its preparation, 8.

he did not originate the statute, 8.

sections as to trusts and devises written by him, 8.

Lord Guilford prepared certain sections of the statute, 7.

he assisted in having the statute passed, 7.

conflicting opinions as to its authorship, 6.

authors of the statute said not to have a distinct conception of written and verbal contract, 10.

BACON, LORD.

opinion of, as to office of a judge, 21, n. 1.

BAILEE.

- vendor may retain goods as bailee for the vendee, 262.
- effect of vendor holding goods of vendee as bailee, 262.
- when the purchaser is the bailee, 300.

BAGALLAY, J.

- opinion of, upon the subject of acceptance under the statute, 321.

BARGAIN.

- meaning of, 26.
- "bargain" does not require as strict a construction as word "agreement" in the fourth section, 26.
- if price is not agreed upon in a bargain it may be shown by parol proof, 222.

BAYLEY, J.

- opinion of as to character and effect of contract to raise potatoes, 169.

BEARDSLEY, J.

- opinion of, upon the proper distinction between personalty and realty in the sale of trees, 192.

BELLOWS, J.

- opinion of, upon contracts affected by the statute of frauds, 168.
- as to contracts where labor and skill are to be bestowed on a manufacture, 40, 168.

BIDLE, J.

- opinion of, as to whether standing trees are personalty, 194.

BILL OF LADING.

- where a bill of lading is received by the vendee, acceptance inferred, 278.
- where the same is retained, 277.

BLACKBURN, J.

- opinion of, as to the meaning of acceptance, 323.
- as to crops and chattels being affected by the statute, 154.
- as to the note or memorandum and the validity of contracts, 399, 400.
- on the contract of a bidder at an auction sale, 567.

BLATCHFORD, J.

- opinion of, upon a contract by bought and sold notes, 506.

BLODGETT, J.

- opinion of, on acceptance under the statute of frauds, 271.

BOISE, J.

- opinion of, as to delivery of goods under the statute, 287.

BOUGHT AND SOLD NOTES.

use of bought and sold notes in business, 503.

no particular form of notes necessary, 503.

different kinds of, 503.

deduction from the decisions, 514.

bought and sold notes must contain the terms of the contract, 503.

example of a valid sale-note, 509.

they must correspond in terms, 503, 504, 508.

example of insufficient sale-note, 510.

they should correspond with the broker's entry in his book, 503, 514.

of the memorandum of the broker, 496, 498, 503.

copies of the contract must be sent to each party, 496, 498, 504.

evidence of the contract, 496.

where a bought-note is delivered, the purchaser is bound, 499.

notice of execution of broker's note, 499.

when bought and sold notes are to be made, 504.

case of a valid memorandum in, 498.

what a sufficient compliance with the statute, 504.

Ellenborough, Lord, on bought and sold notes, 504.

bought and sold notes, a copy of the original entry of the broker, 504.

is the original entry the contract, 504.

Denman, Lord, on contracts by bought and sold notes, 504.

contract proved by producing the bought-note, 504.

evidence of the contract, what is, 504, 514.

if no entry is signed by the broker, but perfect bought and sold notes are delivered, the contract is binding, 503, n. 4, 513.

if no entry be signed by the broker, and the bought and sold notes are different, there is no contract, 505, 508, 514.

if the notes differ as to the kind of goods, neither party bound, 505, 508.

no proof of assent of the parties in contracts by bought and sold notes, when, 505.

what diversity sufficient to invalidate the contract, 508.

if the meaning is the same, a difference in language of the bought and sold notes will not affect the validity of the contract, 505, n. 1.

case of *Butler v. Thomson*, on the general subject, 506.

Blatchford, J., opinion of, upon a contract by bought and sold notes, 506.

Hunt, J., opinion of, as to validity of such a contract, 507.

BOUGHT AND SOLD NOTES — continued.

mutuality must exist in such contracts, 507.

no purchaser without a sale, and no sale without a purchaser, 507.

when the broker is special agent for one party only, 504.

price must be mentioned in bought and sold notes, 507.

terms must be clearly stated, 503, 504.

meaning of must be unequivocal, 505, 505, n. 1.

of the contract of sale, 507.

bought-note is delivered to the buyer, 507, 508.

the sold-note is delivered to the seller, 507, 508.

each note represents what the broker has done, 508.

either note sufficient if there is no variance between them, 514.

what diversity between the notes will avoid the contract, 508.

when vendee signs and broker delivers note, 503.

case of *Sivewright v. Archibald*, involving questions arising under such contracts, 508.

where perfect notes are delivered but the broker has omitted to sign the entry in his book, effect of, 503, n. 4, 513.

strict rule as to such contracts relieved, when, 503.

contract valid if signed by vendee and delivered by broker to vendor, although different from one delivered to vendee, 503.

case of *Greeley-Burnham Grocer Co. v. Capen*, law of contracts by bought and sold notes discussed, 509.

where the bought-note was different from the sold-note, court divided, 508.

Thompson, J., opinion of, as to the law of bought and sold notes, 509.

agency of broker sufficiently proved, when, 509.

sale-note, when insufficient; example and law of, 510.

when the quantity of goods is not mentioned, 510.

when no bought-note was signed by the broker, 510.

in case of a material alteration of sale-note, 513, n. 1.

bought and sold notes, deductions from the decisions, 514.

does the broker's entry constitute the contract, 504, 514.

bought and sold notes not considered the contract, 514.

statute satisfied, when, 514.

either note sufficient if there is no variance between them, 514.

one note being put in evidence, the other may be introduced, 514.

jury to pass upon certain questions in relation to sale-notes, 514.

rule as to correspondence governs in such contracts, 514.

memorandum by broker, when to be made, 511, 513.

BOUGHT AND SOLD NOTES — continued.

when sale-note calls for more goods than vendor had on hand at the time, 512.

case of *Cole v. Swanton*, on the subject of delivery, 512.

delivery not sufficient to take contract out of the statute, when, 511.

where part of the goods are delivered under a sale-note, 512.

when delivery is contemplated by the parties but not stated, 512.

within a reasonable time, 509.

readiness to perform necessary, 512.

where party is unable to perform his contract, he cannot complain if the other party fails, 512.

delivery of sale-note, a question for the jury, 513.

parol evidence may connect an instrument with the subject-matter of the contract, 511.

not admissible to explain sale-note, 509.

Daly, C. J., opinion of, as to admissibility of parol proof to connect an instrument with the subject-matter, 511.

contracts by bought and sold notes are governed by the same rules of construction as contracts by correspondence, 514.

acceptance need not take place at the time of the contract, 510, 511.

revocation of broker's authority, when it may take place, 513, n. 1.

BOWEN, L. J.

opinion of, as to what is an acceptance under the statute of frauds, 321.

BRAMWELL, L. J.

opinion of, as to acceptance, and right of objection to goods, 319.

BRETT, M. R.

opinion of, as to the legal effect of the vendee receiving and examining goods sold by sample, 320.

BUSKIRK, J.

opinion of, on pleading the statute of frauds, 594.

CALIFORNIA.

contracts for the sale of shares of stock within the meaning of the statute of frauds, 146, 148.

sale of "mining stock" within, 146, n. 2.

uniformity of the decisions, 148.

are shares of stock, "goods," 140, 145.

statute of California as to contracts by telegraph, 453.

contracts for the sale of growing crops, *fructus industriales*, valid without writing, 162.

contracts for the sale of growing crops, 166.

CAMPBELL, J.

opinion of, on the subject of price under the statute of frauds, 277.

CAMPBELL, LORD.

opinion of, as to the kinds of acceptance under the statute, 317.

CARRIERS.

general duty of a carrier, 325, 339, 344.

common carrier an agent to carry and deliver goods, 340, 343, 347.

common law rule as to delivery to carriers, 341, 343.

carrier selected by the vendee, 98, 339, 344, 352.

when designated in the contract, 339.

when the buyer's agent, 339, 353.

doctrine of the early cases, 344.

when delivery to carrier named by buyer does not amount to acceptance, 345, n. 1.

carrier specially designated, rule as to, 98, 346.

delivery to common carrier will transfer title, when, 346.

statute satisfied in delivery of goods to carrier, when, 317, 339, 352.

carrier selected by the vendor, 344, 353.

example of carrier receiving goods for transportation, 339, 351, 355, 358.

carrier of seller cannot accept for buyer, 278, 354.

Van Hoesen, J., opinion of upon delivery to carrier of vendor's selection, 354.

vendee's option to receive goods sent by carrier selected by vendor, when, 343.

delivery of goods to carrier selected by vendor, not an acceptance by vendee, when, 350.

receipt of part of the goods not acceptance of rest, 281.

after acceptance, delivery of goods to a carrier, 339.

statute satisfied in such case, 339.

delivery by consignor to carrier, when delivery to consignee, 348.

when is acceptance by vendee necessary, where goods are shipped, 351.

Perkins, J., opinion of in *Keiwert v. Meyer*, upon delivery of goods to carrier, 349.

after selection of goods by vendee, a delivery to common carrier sufficient, 354, 357.

after acceptance, a delivery of goods to a designated carrier is a valid delivery, 357, 358.

import of the language of the statute as to acceptance, 341, 343.

acceptance by purchaser necessary, when, 345.

it depends upon the agreement whether goods shipped by a carrier will bind the vendee or vendor, 346.

CARRIERS — continued.

- if property has passed to vendee he may sue in case of loss, 349.
- consignee may sue, when, 348.
- consignor must sue, when, 349.
- agent duly authorized may receive and accept, 340, 355, 358.
- agent may employ a carrier for vendee, 353.
- carrier may have authority to accept, 341.
- before acceptance*, rule in delivery to carrier, 343, 345.
 - case of *Rodgers v. Phillips*, involving question of goods shipped under a verbal order, mode of shipment not mentioned, 343.
 - bill of lading sent and immediately returned where there was no acceptance, 343.
 - Daniels, J., opinion of, on delivery of goods to a carrier under a verbal contract, 343.
 - bill of lading delivered with mutual assent that title is to pass is sufficient to satisfy the statute, 343, n. 1.
 - valid or invalid contract, effect of shipment of goods under, 343.
 - deductions of law upon the subject of, 343.
 - right to object to the goods, 345.
 - common carrier cannot accept, 347.
 - Gilfillan, C. J., opinion of, as to delivery before acceptance, 350.
 - receipt before acceptance not sufficient, 357.
 - vendee's act may be sufficient to show acceptance, 340.
 - when delivery of goods to carrier will not amount to acceptance, 259, 339.
 - expressman cannot accept, when, 249, 263.
 - warehouseman cannot accept, when, 249.
 - goods delivered to the usual carrier, effect of, 268, n. 2.
 - under a valid contract, delivery of goods as directed by vendee, is sufficient, 292.
- valid contract*, delivery to common carrier under, 344, 353.
 - will transfer title and render vendee liable, 346, 353.
 - case of *Magruder v. Gage*, 346.
 - where order for goods is in writing, 346.
 - acts necessary to transfer title to unspecified goods, 346.
 - delivery to carrier susceptible of proof, 347.
 - carrier bailee of whom, 353.
 - delivery of goods to a carrier according to the terms of a valid contract will pass title, 357.
- void contract*, shipment of goods by a carrier selected by the vendor
 - under, in case of loss vendor liable, 344, 345, 349.
 - sometimes depends upon the contract, 346, 357.
 - vendor has knowledge of, an invalid contract, 349.
 - if vendor then ships goods, he takes the risk of loss, 342, 349, 357.
 - verbal order for goods is void until acceptance, 342, 350.
 - where goods are shipped, acceptance necessary, when, 351.

CARRIERS — continued.

receiving is a formal act, 358.

acceptance implies exercise of discretion, 358.

Gray, J., opinion of, as to proof of acceptance where goods are shipped under a void contract, 340, 341.

Rindskopf v. De Ruyter, case of, as to carrier receiving goods, and acceptance by vendee, 351.

place of contract governs, 351.

case of Gray v. Cary, involving question of goods selected, and destroyed before delivery by carrier of vendor's selection, 354, 355.

"delivered," word used in the Iowa statute, 347.

rule as to delivery of goods under a verbal contract, 347.

Love, D. J., opinion of, as to the law governing delivery under the statute, 347.

"delivered," "received," "accepted," not equivalent terms, 347.

when is a carrier *quoad hoc* the buyer's agent, 347.

word "accept" not used in the statute of Iowa, 347.

proof, delivery to carrier susceptible of, 347.

rule as to carriers in Wisconsin, 352.

goods sent by designated carrier, sufficient, 352.

where acceptance necessary, 351.

jury to pass upon acceptance, when goods sent by carrier, 339.

delivery of goods at a station, effect of, 340, n. 2, 353.

at a place designated under a written contract, title passes, 342.

an acceptance under the statute, when, 343.

warehouseman, delivery of goods to a, 353.

vendee making purchases by sample of agent of vendor, not obligated to receive goods if not according to order, 355.

so if purchases are so made by vendee, 355.

when goods sent are different from sample, 355.

acceptance and receipt need not be simultaneous acts, 357.

goods received to test them, not an acceptance, 357.

authorized agent may accept, 341.

liability of carrier, 355, 356.

carrier liable for loss when goods are delivered for immediate transportation, 356.

not liable as a warehouseman, 356.

not liable for loss when goods are delivered awaiting further orders for transportation, 356.

Earl, C., opinion of, on acceptance of carrier and his liability, 356.

CHANCELLORS.

- in early times, 19.
- legislature has supplanted chancellors, 19.
- dispensed justice according to conscience, 19.
- ignored acts of parliament, 19.
- they interpreted contracts, 19.

CHARLES THE SECOND.

- date of his reign, 2, n. 1.
- assented to the statute of frauds, 9.

CHATTEL.

- definition of; contract for the sale of, 73.
- (See GOODS, WARES AND MERCHANDISE; TIMBER AND TREES GROWING.)

COKE, LORD.

- opinion of, on construction of statutes, 27.

COLE, C. J.

- opinion of, upon acceptance under the statute of frauds, 290.
- on the subject of payment, 376.
- words "at the time," used in the statute, construed, 380.
- as to contracts for the sale of growing grass, 172.
- as to the validity of contracts for the sale of standing trees, 181.

COLERIDGE, C. J.

- opinion of, as to contracts of sale of trees to be immediately removed, 191.
- as to construction of contracts for trees and timber, 95.

COMMON LAW.

- what it is, 23.
- common law came from the legislature, 23.
- illustration of, 16.
- parol contract for a chattel, valid under, 130.

CONDITIONS.

- in auction sales, 18, 549.
- under an executory contract, 274.
- what conditions in an auction sale will violate the statute, 549.
- special conditions in auction sales, 552.
- "without reserve," condition in sale at auction, 562.
- "positive sale," in auction sale, 562.
- (See AUCTION AND AUCTIONEERS; CONDITIONAL SALES OF GOODS.)

CONDITIONAL SALES OF GOODS.

- meaning of, 333.
- validity of, 333.

CONDITIONAL SALES OF GOODS—continued.

mode of proof, statute of frauds affects, 333.

Sir Cresswell Cresswell on conditional sales, 334.

the law accurately stated, 334.

Cooley, C. J., opinion of, on conditional sales, 334.

mutual assent necessary, 334.

valid, gold bullion sold before being weighed, 334.

Colt, J., opinion of, on conditional sales, 335.

opinion of judges, 334, 335.

title to vest immediately, although something is to be done

in relation to the goods by the seller, when, 335.

Redfield, J., opinion of, in contracts of sale where something

remains to be done to the goods before delivery, 336.

goods sold which are mixed with others, rule as to, 336.

sale of a horse on conditions, 337.

sale of a mare on condition that she should be with foal,
338.

where chattel is to be returned on certain condition, 338.

what is a distinct contract from another, 338.

instance of an entire contract, 338.

what sale on conditions, will be held one sale, and separate sales,
338.

when is the transaction in a sale complete, 338.

in a sale of a different thing, 338, n. 1.

(See EXECUTORY CONTRACTS; STATUTE OF FRAUDS; CONTRACTS
WITHIN THE STATUTE OF FRAUDS; CONTRACTS WITHOUT THE
STATUTE.)

CONNECTICUT.

statute of frauds of Connecticut reads "personal property," 145,
n. 1.

shares of stock within the statute, 145.

CONSIDERATION.

under the common law, 16.

illustration from Sheppard's Touchstone, 16.

consideration in the memorandum, 242.

Lott, J., opinion of, as to consideration in a memorandum, 440.

consideration not destroyed because the party who does not sign the
memorandum is not liable thereon, 440.

need not be expressed in the memorandum, 403, 447.

consideration paid and goods remain in the hands of vendor, effect
of, 264.

consideration necessary to support an agreement, 168, 440.

when is the agreement a sufficient consideration, 168.

(See PRICE OR AMOUNT.)

CONTRACTS.

- meaning of, for the sale of goods, 26 and n. 1.
- common law rule as to, 4.
- authors of statute of frauds did not have a clear conception of, 10.
- executory contracts under the common law, 13.
- under the statute, 15, 28.
- construed according to intent of parties, 19, 24, 26.
- people free to make their own contracts, 19.
- construction, modern tendency of, 19, 20.
- once deemed of small importance, 20.
- form and ceremony as to, in early times, 20.
- void, where none of the requirements of statute are complied with, 21, 22.
- requisites of, 26.
- nice distinctions as to whether within the statute, disregarded, 22.
- intention of parties sought for, in, 26, 27.
- instance from the Bible of a money contract, 26.
- money always been used in contracts, 26.
- different shades of contracts, 33.
- (See CONTRACTS WITHIN THE STATUTE; CONTRACTS WITHOUT THE STATUTE; CONTRACTS, ENGLISH RULE OF CONSTRUCTION.)

CONTRACTS WITHIN THE STATUTE OF FRAUDS.

- "no contract for the sale of," words construed, 39, 42.
- what is a contract of sale, 37, 63, 78, 90.
- various shades of contracts, 31, 33.
 - what contracts are within the statute, 38, 44.
 - where goods are capable of immediate delivery, 44, 65.
 - where mutuality is wanting, 71.
 - a test as to whether a contract is within the statute, 88, 90.
 - contract, when entirely executory, 28, 40.
 - where labor and skill to be expended, 28.
 - where goods are in existence, 29.
 - rule as to goods *in solido*, 29, 39, 44.
- where something is to be done upon the goods sold, 46, 79.
- a distinction drawn, 28, 44.
- where goods are in substantial existence, 47, 48, 63.
- rule, existence and non-existence, 39, 48.
- single distinction suggested desirable, 44.
- contract where certain work is to be done by the vendor on goods before delivery, 31, 46, 49, 50.
- does not take contract out of the statute, when, 46.
 - a contract of sale, when, 31.
 - perplexing distinctions precluded, 49.
 - rule advanced and commended in a noted case cannot be adopted, 49.
 - a too nice distinction, 83.

CONTRACTS WITHIN THE STATUTE OF FRAUDS—continued.

- “immediately answerable” the rule first advanced, 80.
- criterion, cannot be established in certain cases, 40, 79.
- where goods are to be delivered at a stated time, 82.
- a decision at variance with recent cases, 82.
- contract for a marketable commodity, if at the time agreed upon for delivery, is within, 30, 88.
- distinction, where labor is the essence of the contract, or the materials found, 32, 69.
- when in effect for goods to be delivered, 40.
- no contract until the parties are *ad idem* as to the subject-matter in existence, 42.
- expense in procuring goods will not take contract out of the statute, 41.
- a thing procured for the general market, within, 39, 66, 79.
- a case in advance of others, 45.
- contract to get out “spokes,” is a sale, 37.
- “potatoes,” agreement to raise, in certain piece of land, at stated price, rule as to, 40.
- sale of a pump or engine, is a chattel, 57.
- sewing machines, contract to make, 41.
- where price and quantity agreed upon, 40.
- “flax straw,” to be raised from certain quantity of flax seed, is a sale, 63.
- note for difference between contract price and market value, void, when, 62.
- where article made is unsuited to the market, 65.
- where it is so suited, 65, 69.
- “crop of cotton,” to be raised, is within, 65.
- “wheat,” when not to be raised or manufactured, within, 46, 64.
- where it is partly threshed and partly unthreshed, 76.
- where it is simply to be cleaned, 64, 76.
- a part already on hand, rule in such case, 46, 76.
- “hams,” sold while being smoked, within, 64, n. 4.
- “furniture,” contract for in substantial existence, 60.
- where it has to be covered with goods selected by vendee, 60, 77.
- in solido*, goods substantially within, 89.
- “mixed contract,” how the statute affects, 89.
- what is not a mixed contract, 94.
- “spinning frames,” contract to make, 93.
- old and new doctrine of construction of contracts, 76.
- “flour” to be prepared for shipment, within, 86.
- if, when carried out, the contract will result in a sale, statute applies, 88.
- “artificial teeth,” a contract for the sale of, a chattel, 88.
- work of a sculptor, a sale of a chattel, 88.

CONTRACTS WITHIN THE STATUTE OF FRAUDS—continued.

- Justice Blackburn's construction of contracts, 88.
- as to "border cases," difficult to determine when the statute applies, 44.
- no criterion available in border cases, 48.
- goods, where labor to be bestowed, contract within, 66.
- contract for goods ordinarily made by vendor, 67.
 - "malt," contract to make, and for that already made, where part is received and paid for, and vendee refuses to take more, void, 58.
 - "colt," sale of, to be gelded and delivered at future time, a void contract, 68, 180.
 - bailee, where owner of a chattel is, 130.
 - "cotton gin," sale of, within, 69.
 - distinction as to what contracts within the statute, 69, 116.
 - "oak pins," contract for, to be cut and delivered, 69.
 - another example, 40, 69.
 - "coal," contract for, when void, cost of transportation cannot be recovered, 107.
- "void," certain statutes declare contracts void, when, 107.
- valid part of a contract may be enforced, when, 107, n. 1.
- where contract is special in character, 106.
- rule in *Downs v. Ross*, 104.
- immaterial whether subject-matter of the contract is in existence or not, 104.
 - "turnip seed," contract to sow and sever before being transferred, within, 118.
 - "broom corn," contract to raise on certain acres of land, 115.
 - contract for corn, ungathered, 87.
 - sale of crop of corn to be raised, void, 95.
 - where seed is not sown at the time of the contract, 95.
- contract for an article, quantity and price agreed upon, though not in existence, is a contract of sale, 40, 45, 46, 76.
- the test to be applied in certain cases, 39, 93.
- where part of goods are on hand, and in condition for delivery, 45, 46, 76.
 - what is a chattel, 88.
 - a picture painted by an artist, when a chattel, 88.
 - English doctrine as to art work, 88.
 - a painted picture, held to be goods, when, 88.
 - a different doctrine in this country, 67, 89.
 - criterion, whether materials supplied, or the work, the essence of the contract, 89.
- new English doctrine as to contracts of sale, 76.
- rule in accordance with sound policy, 75.

CONTRACTS WITHIN THE STATUTE OF FRAUDS — continued.

contract for goods whether on hand, or to be secured from a correspondent, equally within, 70.

contract for goods under special order, what, 79.

where personal property is sold and purchaser refuses to take it, seller may keep it and recover difference between contract and market price, 126.

a contract where labor and skill to be blended, 116.

where a chattel has assumed the character bargained for, 93.

a test laid down by Pollock, C. B., 90.

other tests, 73.

Lord Tenterden's act established the true rule, 66, 76, 89.

work and labor necessary to prepare corn for delivery, contract still within the statute, 116.

a sale under the English rule, 30, 34, 72, 73.

skill exceeding value of materials does not take contract out of the statute, 72, 73.

if capable of sale at time agreed upon for delivery, 38, 72, 73.

a class of contracts considered, 79.

(See CONTRACTS WITHOUT THE STATUTE OF FRAUDS.)

Massachusetts, rule of construction, and some other states.

as to contracts within the statute, rule of, 28, 34.

what contracts of sales are within the statute, 39.

goods to be manufactured are within, 35.

manufactured in the usual course of business, 33.

if the manufacturer regularly produces the subject of the contract, it is a sale, 30, 32.

what sales are within the statute, 35.

not much uncertainty in the rule, 33.

statute applies to articles in existence, 33.

where personal elements enter into the contract, 33.

where work and labor are done in a particular manufacture, 39.

rule in Massachusetts criticised, 33.

it brings the cases into good fellowship, 42.

but rests on no satisfactory principle, 32.

the rule distorts the legislative expression, 42.

order for a carriage of materials partly wrought, not a contract of sale, 31.

contract to manufacture a carriage according to model, which never would have been built but for the order, is not within the statute, 39.

Maryland, rule of construction in.

construction of the statute of frauds, 116.

cases follow the English rule, 81, 116.

CONTRACTS WITHIN THE STATUTE OF FRAUDS — continued.

- early case in the state as to executory contracts, 82.
- case of corn to be gathered and delivered, 87.
- case identical with *Eichelberger v. McCauley*, 87.
- New York, rule of construction of contracts.*
 - rule as to what is a contract, 28, 39, 43.
 - a manufacture distinguished from a sale, 43.
 - contract to manufacture goods, not within the statute, 43.
 - subject-matter must be in substantial existence to constitute a sale, 43.
 - manufacture of paper not a sale, 43.
 - contract for flour not yet ground, a manufacture and not a sale, 43.
 - principle of the decisions, 51.
 - illustration of the rule, 45.
- in New Jersey, a contract executory is within the statute, 37.
 - rule of construction of contracts in, 34.
 - a manufacture under special order, not within the statute, 37.
- cases in Nevada follow the New York rule, 36.
- New Mexico, question raised whether the statute of frauds is there a part of the common law, 127.
- Minnesota, case in, question whether the statute of frauds was productive of good, 121.
- (See CONTRACTS WITHOUT THE STATUTE OF FRAUDS.)
- English rule of construction.*
 - influence of the English decisions, 42.
 - as to construction of contracts in England, 30, 34.
 - if a thing made or manufactured will "result in a sale, contract within the statute, 72, 90.
 - it is immaterial whether the subject-matter is in existence or not, 72.
 - deliverable at time of sale, 74.
 - rule where work and labor to be bestowed, 72.
 - contract not within the statute, when work is done on the goods of another, 72.
 - where the contract is for work and labor, 95.
 - work and labor, contract for, where materials are furnished in repairing an article, 72.
 - when otherwise, 77.
 - labor and materials found, not the *test* as to whether the contract is within the statute, 73, 78, 90.
 - distinction drawn, 93.
 - if article made is not properly the subject of sale, it is for work and labor, 73, 95.
 - skill exceeding value of materials, does not take contract out of the statute, 73.

CONTRACTS WITHIN THE STATUTE OF FRAUDS — continued.

- what constitutes a sale under the rule, 73, 78.
- rule for determining, 78, 93.
- sale of a work of art a chattel, 73.
- where the circumstances were peculiar, 73.
- statute of frauds in early cases was strictly construed, 74, 75.
- later constructions of the statute have been liberal, 75-86.
- where article is to be changed in form, 74.
- seventeenth section adopted in many states, 74.
- what is a manufacture, 79.
- article produced in the regular course of business, what, 79.
- statute applies where article is marketable, or made to suit the wants of the buyer, 77.
- decisions in *Towers v. Osborne* considered right, 77.
- Lord Loughborough's opinion as to, 77.
- rule, whether the work is for the seller or the buyer, 73.
- class of contracts, 79.
- goods *in solido*, but work to be done upon them, to put them in condition to suit the buyer, 79.
- to executory contracts, statute of frauds does not apply*, 39, 80, 81, 83.
- where contract is not immediately to be executed, 75, 80.
 - statute relates to actual sale of goods, 80.
 - delivery, special agreement as to, 80.
- early English rule rejected, 80.
- a noted case held to be wrong in principle, 80, 86.
- chariot, contract to make and furnish, 80.
- powerful judgment as to executory contracts not being within the statute, 83.
- apology for Lord Mansfield's decision, 83.
- his decision discarded, 83.
- English rule at the present time as to the application of the statute to contracts, 83.
- contract to be executed at a future day, 83.
- rule established in *Garbutt v. Watson*, 75, 86.
- the new English rule, 86.
- statute applies to contracts not immediately to be consummated, 75, 84.
- damages in case of non-delivery of goods, 84.
- a subject of surprise that executory contracts were ever held to be without the statute, 75.
- English cases back on the foundation of reason, 46.
- statute designed to remove uncertainty in contracts, 84.
- circumstance of shipment of goods does not take contract out of the statute, 84.
- additional price to be paid for delivery does not, 85.

CONTRACTS WITHIN THE STATUTE OF FRAUDS — continued.

- contract within the statute though goods to be delivered at a distance, 85, 94.
- what contracts held to be within the statute, 86.
- conflict of authority as to, 88, 94.
- decisions construe the statute reasonably, 86.
- “flour,” contract of a miller for, 86.
- “artificial teeth,” contract for, 88.
- contemplation of parties, sometimes governs as to cases falling within the statute, 95.
- English cases followed in certain states, 203.

CONTRACTS WITHOUT THE STATUTE OF FRAUDS.

- contract for an article not of general sale, 88.
- for an article not *in esse*, 77.
- rule as to contract for, 66.
- for an article not usually sold in the market, 96, 113.
- for malt, made in the ordinary course of business, 58*a*.
- example, contract for circus tents, 98.
- where goods are shipped and bill of lading sent, 98.
- for the work of an artist, 123, 124.
- labor and skill principal ingredients, 122.
- for goods having no marketable value, 124.
- materials are no particular value in art work, 124.
- ancillary to the artist's skill, 122.
- copies from photographs, what, 124.
- contract for a portrait, what, 66, 123.
- value of, not to be judged by earnings of the artist, 124.
- contract for work of an artist, what, 77, 122.
- contract for a bust of a private citizen, 88, n. 1.
- part performance takes the case out of the statute, 126.
- where a mechanic employed to do work and furnish materials, 122.
- for work of an artisan, 38, 96.
- where special skill of the workman is the inducement of the contract, 39, 40.
- where the skill and labor are contracted for, 40.
- article made from materials selected by vendee, 36.
- contract for building a carriage, 39.
- order for a coat, not within, 125.
- where the buyer has had the personal property placed in his possession, 113.
- where chattels are delivered under a contract for work, 118.
- work for part of profits in a sale of chattels, 114.
- staves to be manufactured, 114.
- broker's contract to buy and sell stocks, 133.
- parol contract to pay for improvements on land, 114.

CONTRACTS WITHOUT THE STATUTE OF FRAUDS — continued.

- parol agreement for distribution of a fence, 111.
- agreement to furnish material for building houses, 121.
- sale of corn in the field ungathered, to be delivered shucked, 116.
- agreement to share in the profits of a transaction, 114, 128.
- sale of partnership interest, 119.
- trusts in personalty, are also, 129.
- special order, goods made upon*, 79.
- general rule of construction of such contracts, 30, 79, 96.
- to paint a picture, 88.
- bust of a private citizen, 88, n. 1.
- work of a sculptor, 88, n. 1.
 - goods manufactured, under, 30, 33.
 - contract for lumber of special kind, 127.
 - vendor to be paid for special goods, 66.
 - materials, when principal consideration, 66.
- manufacture under special order, contract without the statute, 34.
- out of the routine of business, 36.
- at a place selected by the defendant, 36.
- theatre or opera tickets, sale of*, 132.
- does not affect interest in land, 132.
- they are merely personal, 132.
- purchaser of tickets for an opera may recover damages, when, 132.
- contract between brokers to buy and sell stocks is not required to be in writing, 133.

COOLEY, C. J.

- opinion of, as to acceptance under the statute of frauds, 279.
- on the subject of license in vendee to enter upon vendor's land to do certain acts, 206.

CROCKER, J.

- opinion of, as to contracts for the sale of growing crops, 164.

DALY, C. J.

- opinion of, as to admissibility of parol proof to connect an instrument with the subject-matter of the contract, 511.
- as to sale and manufacture, 52.

DAMAGES.

- for non-delivery of goods, 108, 164, 294.
- damages recoverable where part of goods are delivered and a refusal to deliver remainder, 294.
- amount of damages between contract price and market value, 101.

DANIELS, J.

- opinion of, as to delivery and acceptance of goods by carrier, 343.
- on a contract for the sale of timber, 197.

DELIVERY.

- delivery of goods when the contract is void requires an acceptance to pass title, 312.
- delivery, followed by inspection of goods and rejection, does not make out an acceptance, 312.
- order delivered does not constitute an acceptance, 312.
- delivery of goods at a railway station, effect of, 324.
- delivery on board a vessel, as carrier, whether an acceptance by vendee, 449.
- keys delivered, when a symbolical delivery, 392.
- goods delivered to a carrier designated by the purchaser constitutes an acceptance and receipt sufficient to satisfy the statute, 449.
- (See ACCEPTANCE; RECEIPT AND DELIVERY.)

DEMURRER.

- demurrer as to shares of stock being within the statute, 140, n. 3.
- declaration demurrable, when, 589, 595.
- when price not averred, 218.
- statute of frauds not available by demurrer, 584, 595.
- (See PLEADING THE STATUTE OF FRAUDS.)

DENMAN, LORD.

- opinion of, upon contracts by bought and sold notes, 504.

DEPUE, J.

- opinion of, as to payment under the statute of frauds, 384.

DEVENS, J.

- opinion of, as to the validity of a sale of goods by sample, 310.

DIXON, J.

- opinion of, on pleading the statute of frauds, 595.

DWIGHT, C.

- opinion of, upon delivery and acceptance under the statute of frauds, 269.

DWIGHT, PROFESSOR.

- opinion of, as to place of contract under the statute of frauds, 604.
- construction of the statute as to contracts falling within it, 400.

EAKIN, J.

- opinion of, on symbolical delivery, 331.

EARL, C.

- opinion of, on acceptance by carrier, 355.
- on payment "at the time," 370.

EARNEST AND PART PAYMENT.

- common law principle of earnest, 16, 365.
- early history of giving earnest, 359, 363.
- meaning of earnest, 363.
- the custom and effect of giving earnest, 359.
- “hand-sale,” what it was, 359.
 - earnest under the Roman law, 359.
 - of two kinds, 359.
 - of what consisted, 359.
 - symbol of bargain concluded, 359.
 - formerly no part of price, 359.
 - suited the unlettered ages, 360.
 - contract *nuda pacta*, without earnest, 141.
- statute of frauds*, “earnest” omitted in many of them, 360.
- early cases where earnest was given, 361.
- earnest vests the property in thing sold, 16, 62, 361.
- “earnest to bind the bargain,” words of some statutes, 362, 382.
- is independent of the bargain, 362.
- earnest paid on a contract, for a crop to be raised, 95, 163, 165.
- earnest tendered is not sufficient, 362.
- part payment in contracts for pelts, 252.
- earnest equivalent to part payment, 169, 363, 369.
- earnest in sale of shares of stock, 140, 149, 150.
- must be given at the time of the bargain, 363.
- effect of, 364.
 - “*part payment*,” or “part of purchase money,” words of some statutes, 362, 363, 396.
 - meaning of part payment, 293, 383.
 - must be paid “at the time,” 363.
 - agent may receive payment for his principal, 389.
 - example of, under the statute, 365.
 - words “at the time,” strictly construed, 366.
 - where contract is restated at the time of payment, 366.
 - subsequent payment insufficient, when, 368.
 - part payment on a sale of crop of growing hops, 159.
 - a promissory note not considered as earnest, 390, 391, 395.
 - a “check” may be payment, 371.
 - earnest or part payment must be money’s worth, 395.
 - a check is considered “money’s worth,” when, 371.
 - intention of the statute as to payment, 245, 371.
 - reasonable meaning of the statute as to, 378, 379.
 - before payment neither party bound, 374.
 - money, what deemed equivalent to, 375.
 - parties may treat a thing of value as money, 375.
 - may agree as to what shall be part payment, 383.
 - money deposited as a forfeiture not payment, 381.

EARNEST AND PART PAYMENT — continued.

- earnest deposited in such case equivalent to payment, 381.
- the statute means "pay down," 383.
- "goods" may be taken as part payment, 383, 384.
- insufficient to satisfy the statute, when, 387.
- payment vests title in vendee, 264, 304.
- though property still in hands of vendor, 304.
- question of liability where part payment is made, 303.
- example from Blackstone, 261.
- payment in an executory contract, 99.
- account, to apply as part purchase, 383.
- where mutual debts exist one may offset the other, 386.
- what deemed sufficient, 383.
- example of goods sold in payment of a debt, 384.
- case of *Mathiessen v. McMahon*, 384.
- a receipt or actual credit must be given to constitute a payment of a debt due from the seller, 384.
- statute not satisfied unless, 384.
- an early case on the subject, 384, n. 4.
- chattel delivered in part payment, 384, n. 4.
- Depue, J., opinion of, as to payment, 384.
- part performance necessary, 384.
- surrender of the evidence of the debt, 384.
- actual application must be made, 384.
- simple agreement to pay in a certain way will not satisfy the statute, 384.
- payment to an agent sufficient, 389.
- payment to a third party, when sufficient, 384, n. 1.
- words alone will not satisfy the statute as to payment, 385, 386, 387.
- cash, work and materials as payment, 300.
- part payment implies receipt and acceptance, 304, 388, 389.
- debt due to the agent of the buyer from seller, applied, not sufficient, 391.
- case of *Ireland v. Johnson*, on the subject of a promissory note as part payment, 391.
- distinction between purchaser's own note and a note of a third person as to being earnest or part payment, 391, 395.
- note of a third party may be received as part payment, 391, 395.
- surrender of old note as part payment, 392, 395.
- Lyon, J., opinion of, as to surrendered note being payment, 392, 395.
- the seller may receive note held against him in payment, 395.
- the statute does not condemn sales in any case, 364.
- but the sale must be authenticated, 364.
- part payment, acceptance or receipt, requirements of, 364.

EARNEST AND PART PAYMENT — continued.

- part performance may originate with the buyer or seller, 388.
- mutual assent necessary in any case, 388.
- part performance avoids operation of the statute, 133, 295.
- acts relied upon as to part performance must refer to the contract, 133.
- "*at the time*," words used in many statutes as to payment, 290, 367, 376.
- meaning of the statute, 371.
- contract taken out of the statute only when payment so made 366, 370.
- words "*at the time*," in Massachusetts statute, construed, 373.
- Earl, C., opinion of, upon the subject of payment at the time, 370.
- what will not be a payment "*at the time*," 370.
- a case illustrating the subject, 261, 371.
- payment accepted with concurrence of the parties, sufficient, 374.
- anything in lieu of money as payment must be paid at the time, 375.
- Cole, C. J., opinion of, as to payment at the time, 376, 380.
- Lyon, J., on the same subject, 379.
- revised statutes of New York on the subject, 367, n. 2.
- decisions under the New York statute, 377.
- what payment held not sufficient, 379, 381.
- what is a payment "*at the time*" of the contract, 383, 385.
- case of *Brabin v. Hyde* on the subject, 385.
 - part payment at the time, an early case, 393.
 - case of *Thornborow v. Whitacre*, 394.
 - contract for "*two rye corns next Monday*," etc., 394.
 - "impossible" contracts may be enforceable by law, 394.
 - "foolish contracts hold in the law," instance of, 394.
- in states where the statute does not require payment to be made "*at the time*," the courts hold it necessary, 367.
- payment and acceptance, distinction between, 376.
- reformation unnecessary where earnest is paid, 382.
- "*at the time*," conclusions as to part payment, 395.
- not "*at the time*," payment made, where contract is re-affirmed or restated, 368, 376, 395.
- a cause of action arises then, 368, 370.
- minds of the parties must meet upon re-affirmance, 370, 376.
- it is necessary that the contract be restated, 376.
- a new contract then entered into, 370, 372.
- proof necessary to show restatement of contract, 371.
- contract is valid from the time of adoption and payment, 372, 373.

EARNEST AND PART PAYMENT — continued.

- effect of subsequent delivery of the goods, 372.
- “ new contract ” made, when payment takes place, 373, 374.
- review of cases as to subsequent payment, 374.
- nice distinctions disregarded, 376.
- exercise of ownership sufficient to satisfy the statute, 377.
 - example of restatement of oral contract and part payment, 378, 395.
- instance of part payment made where the contract was insufficient, 379.
- in case of refusal of second payment, 163.
- case of *Paine v. Fulton*, involving the subject, 379.
- goods delivered presumably upon an oral contract made some time before, not sufficient, 380.
- payment where nothing is said as to its application, 89, 98, 370.
- case of *Hunter v. Wetsell*, involving the subject, 370.
 - agreement to extend time to pay balance of purchase price, is not a new contract, 393.
- new consideration not necessary for an alteration of the time of payment, 393.
- case of *Parker v. Steward*, as to extension of time of payment, 393.

EASTMAN, J.

- opinion of, on delivery of goods, 252.

ELBERT, C. J.

- opinion of, on delivery of goods, 329.

ELLENBOROUGH, LORD.

- opinion of, on bought and sold notes, 504.

ENGLISH RULE.

- deductions from the English rule as to contracts for chattels, 155.

ENTIRE CONTRACT.

- when is a contract entire, 100.
- if part of an entire contract is void, it is all void, 107, 129.
- the good part of a contract cannot be separated from the bad and separately enforced, 107.
- where part of the contract is prohibited by the statute, the valid part may be available, 107, n. 1.
- contract for personalty, including realty, part as to personalty is valid, 129.
- where the part of a contract within the statute is executed, the rest may be enforced, 133a, n. 4.
- when the contract is entire, delivery of a part will validate the contract, 294, 295, 296, 585.
- exception to the rule, 297.
- (See **CONTRACTS WITHIN THE STATUTE; CONTRACTS WITHOUT THE STATUTE.**)

EQUITY.

as affecting the statute of frauds, 183.

EVIDENCE.

at common law a parol contract for a chattel is valid, 130.

French law, verbal evidence, 13, n. 2.

Roman law, as to written evidence, 13, n. 2.

under the statute of frauds the contract must be in writing, 409.

the statute prescribes a rule of evidence, 4, 24.

burden of proof is upon the party who relies upon the contract, 250.

of evidence of compliance with the contract, 317.

when is written evidence of a contract dispensed with, 251.

as to evidence of acceptance of goods, 269, 277, 285.

what is sufficient evidence of, 314, 319.

of delay in repudiating contract, 314.

it is error to exclude evidence of contents of a telegram which, by mistake, was not sent, which stated that purchaser declined to take the goods, 292.

parol evidence admissible to show that, 292.

parol evidence not admissible, 405, 443.

to prove modification of a written agreement, 63.

to show facts in connection with the memorandum, 443.

to show the quantity of goods under the contract, 443.

to increase the quantity over the memorandum, 416.

to explain a sale-note, 509.

evidence of a parol agreement mutually beneficial to the parties is not admissible, when, 210.

parol evidence not admissible to show the connection of an unsigned paper with a signed one, 462.

nor to connect documents to make a valid memorandum, 433.

nor to release a party from a contract to purchase shares of stock in a corporation, 151.

nor to show an agreement to purchase a pew, 116, 117.

exceptions as to the admissibility of parol proof, 405.

parol evidence admissible, 405.

example of, 405.

parol evidence may be used to show that A. simply made the contract for B. as agent, 435.

may establish trusts in personality, 129.

to show that something to be done, not included in the memorandum, is included in another paper, and what it is, 412.

(See PAROL PROOF.)

EXECUTORY CONTRACTS.

- common law as to, 13.
 - formerly not required to be in writing, 13.
 - statute of frauds affects, 15.
 - Lord Tenterden's act as to, 14.
 - early rule excluding them from the operation of the statute, 15, 39, 80.
 - are held within the statute, 28, 39.
 - English rule as to, 39, 83.
 - American rule as to, 39.
 - when entirely executory, 28, 83.
 - rule of construction in New Hampshire, 38.
 - when contract to be executed *in presenti*, 37, 83.
 - when not immediately to be executed, 75, 80, 83.
 - conflict of opinion on the subject, 37.
 - statute must be complied with, 120.
 - as to the sale of chattels, 289.
 - as to the sale of crops, to be severed before vesting in purchaser, 153.
 - an executory contract of a certain kind void, 120.
 - for the sale of chattels, 212.
 - where profits and losses are to be shared, 128.
 - another example, 83, 120.
 - rule of *Garbutt v. Watson*, the true one, 75, 83.
 - Lord Mansfield's decision as to, 83.
 - executory contracts declared not within the statute, 81, 83.
 - apology for Lord Mansfield's opinion, 83.
 - policy of the decision rejected, 80.
 - a subject of surprise that such contracts were ever declared to be without the statute, 75.
- (See STATUTE OF FRAUDS; WORK AND LABOR.)

FACT.

- what is a presumption of fact, 256.
- of the ultimate fact, 256.
 - the court will withhold facts from the jury when they are not sufficient to show acceptance of goods, 256.
 - as to artificial reasoning and natural reason of the court in passing upon the question of acceptance, 256.
 - facts in a case determine the question of receipt of goods, 284.
 - fact of performance of a contract may be disputed although there has been an acceptance, 258.

FRENCH LAW.

- the French law as to verbal evidence, 13, n. 2.

GEORGIA.

- statute of frauds of Georgia, 65.
- "treasury checks," not within the statute, 147.

GILFILLAN, C. J.

opinion of, as to delivery of goods to carriers, 350.

GOLD.

is personal property, 152.

a commodity, 152.

a contract for, must be made in compliance with the statute, 152.

GOODS, WARES AND MERCHANDISE.

of large signification, 137.

mean tangible and corporeal movable property, 136.

commodities bought and sold in trade and commerce, 136.

general definition of, 136.

meaning, liberal interpretation, 136.

lexicographers' definition of, 136.

"contract for the sale of," meaning of, 26.

courts are influenced by definition of, 136.

wording of, the statute of frauds of the several states, 25.

goods, definition of, 136.

includes merchandise and chattels, 136.

is *nomen generalissimum*, 136.

under the civil law, meaning of, 137.

bona in the civil law, 137.

bona and *biens* in the early English statutes, 137.

merx est quicquid vendi potest, 137.

goods and chattels, cover most everything trafficked for, 137.

embrace promissory notes, 152.

meaning of, depends upon the subject-matter, 137.

"*goods and wares*," distinguished from merchandise, 136.

wares, meaning of, merchandise commodity, 136.

commonly something to be sold, 136.

merchandise, meaning of, distinguished from goods and wares, 136.

personal things used in trading, 137.

maxims and phrases, 137.

construction of the statute of frauds as to, 138.

rule of interpretation of statutes, 138.

of goods in substantial existence, 44.

if subject-matter be goods at completion of contract it is within the statute, 95.

brewery trucks considered as goods, 70.

where skill is employed on goods, 93.

goods, shares of stock, as, 139, 142, 145, 150.

shares of stock are within the statute, 139.

variant decisions on the subject, 139.

language of the statute of different states, 139.

English decisions hold that shares of stock are not within the statute, 139.

GOODS, WARES AND MERCHANDISE — continued.

- first case on the subject, 140.
- held to be choses in action, 139.
- incorporeal rights not within the statute, 139.
- documents of title without the statute, 139.
- early doubts expressed as to shares falling within the statute, 140.
- a case made and heard before all the judges of England, 140.
- the bench divided on the question, "six against six," 140.
- Lord Chancellor considered the subject too difficult for him, 140, n. 2.
- demurrer, as to stocks being within the statute, 140, n. 3.
- the case of *Massell v. Cooke*, 141.
- referred to by Gray, C. J., 141.
- chancery court of England held shares to be within the statute, 141.
- and that contracts for sale of, were *nuda pacta*, without earnest, 141.
- question deemed unsettled when Mr. Comyn wrote his work on contracts, 142.
- now settled in England that a contract for the sale of shares of stock is not within the statute, 142.
- American courts generally* hold shares of stock to be within the statute, 142, 144, 146, 149.
- contracts for sale of stocks void unless the requirements of the statute complied with, 142, 144, 145, 145, n. 1.
- reasons why they fall within the statute, 142.
- views of Shaw, C. J., on that subject, 144.
- danger of perjury in sales of, 144, 145.
- common sense view of the subject, 144, 149.
- "goods," shares of stock held to be within the meaning of the statute of several states, 140, 145, 148, 150.
- Walton, J., opinion of, why shares are embraced within the statute, 149.
- Ames, J., opinion of, on the same subject, 149.
- Waite, J., opinion of, on the same subject, 151.
- California courts hold shares of stock to be within the statute, 146.
- contract for the sale of mining stock, within, 146, n. 2.
- "personal property," statute of Connecticut reads: shares of stock within the statute, 148.
- in Florida, shares of stock are declared within the statute, 146.
- "treasury checks" in Georgia, held to be within the statute, 147.
- Indiana, where statute reads "goods," shares of stock are not within the statute, 147, 148.
- "notes" held not within the statute, 147, 148.
- "checks" not within, 147, 148.
- "bonds" not within, 147, 148.

GOODS, WARES AND MERCHANDISE — continued.

“evidences of value” not within, 147.

Indiana and English statute construed, 148.

an invention is not goods, 143.

statute does not extend to certain securities, 149.

in Maine, shares held within the statute, 146.

in Maryland, where words “personal property” are used in the statute, shares of stock within, 146.

in Massachusetts, shares of stock held to be goods, 144, 148.

in Missouri, shares of stock within the statute, 145.

in Vermont, shares of stock held as goods, etc., 146.

in New Hampshire, where statute reads “goods, wares and merchandise,” promissory notes held within the statute, 147.

in New York, shares of stock held not within the statute, 147.

“goods, chattels, and things in action,” does not include stock, 147.

stock sold and taken back, statute does not apply, 147, n. 3.

“goods, wares and merchandise” embrace stocks, 144, 150.

conflict of opinion as to, 150.

remedy intended by the legislature, 145.

leading cases as to sale of shares of stock, 150.

securities not of common sale and barter are not within the statute, 149.

subscription to shares of corporation about to be formed, 150.

agreement to repurchase, invalid, when, 150.

transaction as to sale and resale not changed, 150.

discharge from contract for sale of shares, not sufficient consideration of release to pay, 151.

parol promise insufficient, 151.

must be on sufficient consideration, 151.

“moral obligation,” sufficient consideration, when, 151.

part performance unavailing in stock transactions, 151.

“promissory notes,” held to be within the statute, 152.

“personal chattels are movable goods,” 152.

meaning of certain words, 152.

Grover, J., held that “gold” was within the statute, 152.

“gold” is personal property, 152.

statute of frauds embraces gold, sold, 152.

invention, sale of an interest in, not within the statute, 143.

evidence of a right, not within, 143.

“*in specie*,” as applied to the statute, 143.

statute extends to what kind of property, 143.

(See SAMPLE, GOODS SOLD BY.)

GRAY, C. J.

opinion of, on the question of acceptance and receipt sufficient to satisfy the statute of frauds, 268.

an old case referred to by, 141.

GRAY, J.

opinion of, on delivery of goods to carriers, 340.

GROVER, J.

opinion of, as to gold being a commodity and within the statute, 152.

GROWING CROPS.

of growing crops under the common law, 154.

anything which was the subject of larceny was deemed to be goods, 154.

larceny could be committed on them at common law, 154.

statute of frauds wrought no change as to the law of growing crops, 154.

rule of construction as to, 154.

they are chattels, 154.

what crops fall within the meaning of the statute, 159.

Mr. Justice Blackburn's opinion, as to growing crops and chattels, 154.

"no contract for the sale of any goods," construction of the words, 165.

anything attached to the soil, 153, 154.

first distinction, part of the realty in the *interim*, 155.

contract for property attached to the soil must be evidenced by writing, when, 153.

English rule deduced as to a contract for a chattel, 155.

first distinction as to growing crops, 153, 170.

second distinction as to the sale of, 153.

before severance; contract for sale of property attached to the soil before severance must be in writing, 153, 154.

it is not a contract for the sale of goods, 154.

after severance; contract for the sale of a crop after severance is valid by *parol*, 153, 170.

as to a sale of goods, where transfer is after severance, 154.

cut logs are goods, 154.

cases as to growing crops reconcilable, 157.

a contract takes its character of personalty or realty for the sale of crops from the principal subject-matter, 177.

and from the interest of the parties, 177.

Hovey, J., opinion of, as to growing crops, 166.

distinctions drawn as to growing crops being within the statute, 157.

"annual," some products are not, 157.

as to products yielding successive crops, 157.

crops the *second* and *third* year, 157.

"clover," crops before being exhausted, 157.

"madder" and "teazle," as to crops of, 157.

GROWING CROPS — continued.

Denman, Lord, as to growing crops, 157.

crops the first year are *fructus industriales*, 157.

and *fructus naturales* after the first year, 157.

fructus industriales, what classed as, 156, 177.

growing produce, whether mature or immature, 153, 170, 177.

are not affected by the statute, 164.

what are crops, *fructus industriales*, 156.

what crops are, until exhausted, 157.

crops requiring cultivation, 157.

subjects grown by industry and labor, 158.

statute does not affect, 177.

chattels and goods, 156.

growing crops, if *fructus industriales*, are, 153.

before or after severance, contract for, is a sale of, 153, 154, 170.

“sale of goods,” growing produce reared by labor, 160.

crops not requiring cultivation, 157.

Littledale, J., as to growing produce, 160.

corn and potatoes are chattels and goods, 160.

what embraced in *fructus industriales*, 160, 170, 176, 177.

“fruits” which require periodical labor and attention in their yield, are, 176.

“grain,” produced by industry of man, 156, 177.

“cotton,” is so denominated, 156.

vegetables generally, 156.

“hops” are *fructus industriales*, 160.

in general the courts hold that contracts for the sale of growing crops, if *fructus industriales*, are not within the statute, 164, 176, 177.

they are personal property, 165.

Indiana, decisions of, as to sales of growing crops, 166.

California, decisions of, as to, 166.

Crocker, J., opinion of, as to a sale of growing crops, 164.

writing not required in sale of, 164, 170.

where purchaser of a crop is to have the sole right to the land to derive a profit therefrom, the contract is affected by the statute, 170, 177.

a contract to convey a mere chattel, although in the *interim* a part of the realty, the statute does not affect, 177.

a crop is a chattel, though for a time part of the realty, when, 177.

crops periodically raised by manurance and industry of man do not fall within the statute, 177.

they are a subject of sale, 165.

involves no interest in land, 165, 170.

GROWING CROPS — continued.

- “corn” may be sold while standing in the field, 165.
- where part payment is made on, 165.
- corn in field bought, partly delivered, and paid for in services, 165.
- question of title in such case, when corn sold to another, with knowledge, 165.
- what amounts to a delivery of growing corn, 166.
- breach of contract as to sale of hogs and corn, 166.
- fruit, sale of*, 175.
 - arbitrary rule as to, 175.
 - some grown by great labor, some by little cultivation, 175.
 - fruits are chattels when severed, 175.
 - contract for fruit in a ripe condition is not affected by the statute, 175.
 - though purchaser is to enter upon the land and gather it, 175.
 - severance in law and in fact, 175.
 - distinction between, 175.
 - Maryland decisions as to contracts for the sale of growing fruits, 176.
 - Stewart, J., opinion of, as to contracts for the sale of growing fruit, 176.
 - “peaches” classed as *fructus industriales*, 176.
 - statute does not include such contracts, 176.
 - where purchaser is to remove the crop, 176.
 - license, express or implied, for purchaser to gather the fruit, 176.
- statute*, objects of, would be perverted if a contract of sale of growing crop of peaches, with implied license to gather the fruit, were held invalid, 176.
- hops as personal property*, 158.
 - as emblements, 158.
 - any natural growth of the soil, not emblements, 194.
 - hops growing out of old roots, 158.
 - root of hops is perennial, and grown by industry, 158.
 - raised annually by labor and cultivation, 159.
 - as to parol contract for sale of hops, 159.
 - where part payment is made in sale of, 159.
 - contract for sale of growing hops, within the statute, 159.
 - when hops to be delivered to defendant’s kiln, 159.
- “*goods, wares and merchandise*,” growing crops not embraced in, when, 160.
- Park, B., opinion of, as to contract for the sale of growing hops, 160.
- memorandum necessary, when, 159.
- hops maturing on the vines, contract for, within the statute, 159.

GROWING CROPS — continued.

Morgan, J., opinion of, on the subject, 161.

when will a sale of hops fall within the stamp act, 161.

an agreement for the sale of goods and something more, where hops are sold which shall grow on certain acres of land, 161.

“hop-grounds,” interest in, 161.

as to contract for the sale of hops not in the state of goods at the time, how statute affects, 161.

“all the hops that should grow” on a certain piece of land, contract for, exempted from the stamp act, 161.

“potatoes,” contract for, to be raised on three acres of land, 168.

whether writing necessary, 168.

contract for work and labor, what is, 168.

Bellows, J., opinion of, on contracts affected by the statute, 168.

skill of workman may be bargained for, 168.

statute does not apply, when, 168.

when employer is entitled to skill and labor of a workman he is not obliged to take any other, 168.

when a mixed question of law and fact, 168.

jury to pass upon such question, 168.

what is a contract “essentially for work and materials,” 168.

what is substantially a sale of potatoes, 168.

consideration for the agreement, 168.

“doubtful and conflicting claims,” to sustain an agreement, 168.

“a cover of potatoes,” then in the ground, contract for, 169.

not an interest in land, 169.

earnest paid, on account of a cover of potatoes in the ground, 169.

Bayley, J., opinion of, in such case, 169.

“contract for goods,” where potatoes are to be raised on a certain piece of land, but no part of land to vest, 169.

it is a sale of “goods and chattels,” 169.

potatoes mature in the ground, sale of, a chattel, 170.

where price is agreed upon, 170.

the contract is within the statute, 170.

“mere warehouse for potatoes,” land is, where the product is mature in the ground, 170.

no interest in the land, 170.

CALIFORNIA, case of *Davis v. McFarlane*, 163.

Sanderson, J., opinion of, as to growing crops, 163.

what is an interest in land, 163.

growing crops, *fructus industriales*, sale of, valid without writing, 163, 163.

when crops not liable in execution, 162.

where mortgage is given on growing crop, 162.

when crop not subject to execution, 162.

Sprague, J., opinion of, on the same subject, 162.

GROWING CROPS — continued.

- where a part of crop is for services, 162.
- “annual produce,” what is a crop of, 173.
- case of sale of hay, wheat and barley, 162, 164.
- until nature has prepared a crop for delivery, it is not within the statute, 163.
- chattels, as crops, do not fall within the statute, 163.
- “absolute intention” as to sale of crops, 163.
- rule that growing crops are not within the statute, is not affected
 - by the fact that vendee is to have possession of the land to harvest crop, 163.
- when are growing crops not within the statute, 163.
- growing wheat* is a chattel, 156.
- writing not required in sale of, 163.
- vendee is entitled to ingress and egress to gather crop, when, 156.
- wheat growing, may be sold on execution, 156.
- in case of conversion, 163.
- delivery of crop by delivery of possession of land, 163.
- delivery, failure of, 164.
- where part payment is made, 163.
- where purchaser pays certain expense of as to growing crop, 163.
- sale of a growing crop on public land, 163.
- what amounts to possession of growing crop, 163.
- case of resale of growing crop, 164.
- where payment is to be in grain, 164.
- “half the crop” for services, case of, 167.
- where purchaser contracted for all the barley that should be raised on two farms, and price agreed upon, but receives half the crop, case of, 167.
- purchaser may refuse to accept, when, 167.
- “breach of the contract,” where party refuses to accept barley not of the seller’s raising, 167.
- trespass* will lie for loss of a crop of wheat, when, 167, n. 2.
- tobacco, sale of growing crop*, 164.
- title in vendor till delivery, 164.
- delivery cannot be had till raised, 164.
- acceptance of crop, what will amount to, 164.
- fructus naturales*, governed by statute, 153.
- such products before severance, a part of the soil, 153.
- “fruit on trees,” held to be, 156.
- “grass,” held to be, 153, 156.
- “timber,” and the like, 156.
- construction, as to sales of crops, *fructus industriales*, and *fructus naturales*, 153.
- growing crops, *fructus naturales*, if to vest in buyer after severance, are chattels, 153, 158, 159.

GROWING CROPS — continued.

real estate, hop roots, when, 158.

where subject grows without cultivation, 158.

what is declared an interest in land, 158, 177.

distinction existing before the statute, 156.

growing trees a part of the land, 154.

reference to the fourth section, 155.

what leases not exempted in English statute, 155.

where leases for a year and less are excepted from the statute,
rule as to, 155.

when are growing hops not real estate, 159

principal subject-matter, contract takes its character from, for
sale of crop, 177.

“grass,” contract for, to be cut by vendee, 171.

writing required in such a contract, 171.

seventeenth and fourth sections, difficulty of determining
whether certain contracts are within the one or the other, 171.

grass growing, goes to grantee, when, 172.

goes to the heir, 173.

not assets, when, 159.

conflict of authority, as to a parol contract for the sale of growing
grass, fruit or trees, with right of vendee to remove same,
being within the statute, 172.

is a sale of fruit, an interest in land, 172.

sale of natural produce of the earth, 173.

annual produce of labor, and *natural produce*, 173.

chattels, and interest in land, distinction, 173.

after being severed, grass may be seized as a chattel, 173.

grass already grown, sale of, by parol, 174.

Cole, J., opinion of, as to contract for the sale of growing grass,
172.

growing turnips, sold, and no time agreed upon for their delivery, is
an interest in land, 170.

the land is more than a “warehouse,” when, 170.

case of *Parker v. Staniland*, 170.

assets, what are, 159.

“assets,” crops growing, except grass and fruit not gathered, 159.

New York statute as to assets, in crops, 159.

“fruit not gathered,” not assets, 159.

where purchaser has right to land while crop is ripening, to make
profit from the growing surface, contract affected by the statute,
155.

contract is for an “interest in land” where an immature crop is
sold and no time is fixed for its removal, 170.

so where the land is to afford support and sustenance, 170.

of parol consent to a levy on chattels, 173.

(See **TIMBER AND TREES GROWING.**)

GUILFORD, LORD.

said to have prepared certain sections of the statute of frauds, 7,
 assisted in having the statute passed, 7.

Lord Campbell's and Macaulay's opinion of him, 7.

HALE, SIR MATTHEW.

one of the principal authors of the statute of frauds, 5.

he drafted the statute; it had its first spring from him, 5, 6.

reasons for the conclusion, 6, 8.

great common law lawyer, 5.

wrote the history of the common law, 6.

pleas of the crown, 6.

interest in the law of personal property, 6.

his opinion on common law and equity, 8, n. 4.

on the different statutes, 23.

Lord North's opinion of him, 6.

a venerated name, 6.

Runninton's opinion of Lord Hale, 6.

Lord Campbell's opinion of, 6.

Lord Nottingham worshiped him, 8, n. 4.

he resigned as chief justice, 6.

died Christmas day, 1676, 6.

HEBARD, J.

opinion of, on the subject of license in vendee to enter upon land of
 vendor and remove timber or anything attached to the soil, 207.

HOLLAND, PROFESSOR.

opinion of, as to the effect and meaning of words, "allowed to be
 good," in the statute of frauds, 400.

HOVEY, J.

opinion of, as to the sale of growing crops of grain, 166.

HUNT, J.

opinion of, in the case of *Butler v. Thompson*, as to the law of bought
 and sold notes, 507.

ICE AS GOODS.

ice is a product of water, 216.

is ice goods, wares and merchandise, 213.

is changed in form, when, 213.

ice and water, as to property in, 214, n. 3.

character of, generally, 216.

when may ice be taken from a stream, 214, n. 3.

ice, cutting, storing and preparing it for sale, not a manufacture,
 215.

a natural production, as sand, gravel, coal, fruit, 215.

ice made by frigorific effects, a manufacture, 215.

ICE AS GOODS — continued.

ice is personalty, 216.

whether in or out of water, 216.

whether it is realty, 216, 216, n. 1.

ice sold by parol, 216.

sale of ice, when particular scope of it is designated, 216.

resale of ice where price has been paid, case of *Higgins v. Kusterer*, 216.

ice not like fruit or crops, 216.

"nourishment before maturity," as to fruits, 216.

title to ice in possessor of the water, 216, 216, n. 1.

owner of bed of the stream may prevent removal of ice, 216, n. 1.

reasons why ice is personalty, 216.

ice has no organic connection with the estate, 216.

"black letter metaphysics" not required in deciding as to what ice is, 216.

to be dealt with according to its use in fact, 216.

ice and water, distinction between, 216, n. 1.

(See MANUFACTURE.)

INDIANA.

statute of frauds of, in effect same as the English, 115.

the statute reads, "goods," 147.

Buskirk, J., construction of the statute, 148.

rule of English courts followed as to shares of stock not being within the statute of frauds, 148.

"goods" does not mean shares of stock, 148.

"evidences of value," not within the statute, 147, 148.

"bonds," not within, 147, 148.

"checks," not within, 147.

"promissory notes," not within, 148.

law as to contracts for the sale of growing crops, 166.

"unless the purchaser shall receive," language of the statute of frauds, 287.

INGALLS, J.

opinion of, as to the intention of the legislature in regard to the note or memorandum, 440.

INVENTION.

contract for an interest in an invention is not within the statute of frauds, 143.

evidence of a right, not within the statute, 143.

statute extends to what kind of property, 143.

in specie as applied to the statute, 143.

(See STATUTE OF FRAUDS.)

IOWA.

- "delivered," used in the statute of frauds of Iowa, not the word accept or accepted, 347.
- code of Iowa as to evidence of contracts, 245, n. 6.

JENKINS, SIR LEOLINE.

- was one of the authors of the statute, 5, 7, 8.
- authority in probate law, 7.
- drew the sections as to wills, 7.
- absent from England when the statute of frauds was passed, 7.
- ninth report of historical MSS. commission ascribe the authorship of certain sections of the statute to, 7.

JOHNSON, J.

- opinion of, as to the question of title to cut trees, under the statute of frauds, 187.

JURY.

- the jury decide as to inferences of fact, 440.
- jury to pass upon mixed question of law and fact, 168.
- to determine ultimate facts from probative facts, 256.
- on question of intention, 262.
- to find whether the contract was restated or reaffirmed or not, 371.
- jury are to pass upon the question of acceptance of goods, 277, 279, 282, 282a.
- when goods were delivered to a carrier, 339.
- whether there is sufficient evidence of acceptance, 249, 251, 252, 256, 262, 277, 282.
- when justified in finding an acceptance, 319, 320.
- as to whether the contract has been proved, 97.
 - whether there has been a complete performance of the contract, 71.
 - whether the circumstances show acceptance, 282a.
 - whether the rejection of goods was within a reasonable time, 282.
 - whether was a delivery of the goods, 293.
 - when the delivery is constructive or symbolical, 327, 332.
 - verdict may be set aside, when, 326a.
 - whether the bulk was equal to sample, 319, 324.
- of the fact of possession in the buyer, 113.
- damages, a question for the jury, 97.
- jury not to pass upon value of art work, when, 124.
- instance of instructions to jury correctly refused, 166.
- as to special findings of a jury, 290.
- signature*, where the signature to the memorandum appears in the body of the instrument, jury to determine question of intention of the parties, 466, 473.

JURY—continued.

- broker's note, as to its delivery, 498, 499, 514.
- as to the delivery of a sale-note, 513, 514.
- province of jury not ordinarily trenching upon, 513.
- court, when to withhold case from the jury, 257, 258.
- jury to say whether acceptance of bought and sold notes is evidence of a new contract, 514.

KENT, CHANCELLOR.

- opinion of, as to cost of litigations under the statute, 8.
- on the meaning of the statute as to memorandum, 470.
- as to the signature of the parties, 483.

KENT, C. J.

- opinion of, as to sufficiency of broker's memorandum, 502.
- on delivery and acceptance under the statute, 306.

LAKE, J.

- opinion of, on the subject of the statute of frauds as to pleading, 583.

LAW.

- power of, to control conduct, small, 27.
- should be adjusted to habits of society, 27.
- conclusion of law, the result of artificial reasoning, 256.

LAW OF PLACE.

(See PLACE OF CONTRACT.)

LEGISLATURE.

- intention of the legislature, the guide in construing a statute, 1.
- has supplanted the chancellor, 19.
- statute and common law came from the legislature, 23.
- all law begun by the consent of the legislature, 23.

LE GRAND, J.

- opinion of, in case of repurchase of standing trees, 188.

LEX LOCI.

(See PLACE OF CONTRACT.)

LEX SCRIPTA.

- what it is, 23.

LEX NON SCRIPTA.

- what is deemed to be, 23.

LICENSE IN THE VENDEE.

- meaning of license, 200, 211.
- license, what it is, 211.
- is not a grant, 208.
- who may grant a license, 199.

LICENSE IN THE VENDEE — continued.

- license, privilege, easement, distinction between, 210.
- license does not extend beyond the interest of vendor, 199.
- “license; sale;” legal form, 206.
- does not pass any estate in land, 200, 201, 212.
- distinction between license and interest in land, 211.
- license good without writing, 201, 204, 211.
- when license implied, 199.
- case of *Witmarsh v. Walker*, 201.
- license may be pleaded without deed, 200.
- evidence of a parol agreement mutually beneficial to the parties not admissible in evidence, when, 210.
- evidence of a licensee, qualifications as to, 210.
- defense to the license, 206, 209.
- when license executed, 209.
- execution of license, a defense against action by licensor, 206, 209.
- licensee a trespasser, when, 209.
- what will amount to a license in the vendee*, 201, 204, 206, 209.
- implied license, 199.
- case of *Owens v. Lewis*, 207.
- license to cut timber will protect purchaser from anything done under it, 206.
- license follows a verbal sale of timber, 199, 206.
- right or license to enter upon land by vendee inferred from the contract, 199, 206.
- special license*, 203.
- character of the thing purchased influences, 203.
- decisions of Maryland and England on subject of license, 203.
- license incidental to an executed contract, 212.
- immaterial whether the thing is severed by the vendor or vendee, 203.
- implied or express license*, 176, 211.
- in vendee to go upon vendor's land and gather the crop, 176, 207, 211.
- or to remove property, 199, 203, 207.
- where severance from realty is necessary to convert subject-matter into personalty, 199.
- statute of frauds does not affect, 201.
- Hebard, J., opinion of, as to license in vendee to enter upon land and cut and remove anything attached to the soil, 207.
- does not pass any interest in the freehold, 212.
- after vendee has cut timber he has the right to enter and remove it, 207.
- agent of vendee may do it, 207.
- vendee's servant may, 207.

LICENSE IN THE VENDEE — continued.

license, after severance, title will be coupled with an interest and be irrevocable, 207.

parol license, amounts to a permission to do acts on another's land but carries no estate in the land, 181, 201, 211.

trees severed under such a license, title vests in the vendee, 207.

to cut timber for a fixed price for the stumpage, valid, 205.

parol license or agreement for the sale of growing trees, will be equivalent to a license in the vendee to enter upon vendor's land, 207, 211.

parol license is not covered by the statute, either as a sale of an interest in land, or of chattels, 201, 205, 211.

good without any writing, 201.

statute of frauds does not apply to a contract whereby vendee is to cut and carry away trees sold, when, 212.

when statute does apply in sale, 212.

license and privilege, distinction between, 210.

easement and privilege require to be in writing, 210.

license may be by parol, 210, 211.

license in form of a written agreement, conveys an incorporeal right or easement, 181.

license will be acted upon, vendor bound to assume it, 206.

Cooley, J., opinion of, on subject of license in vendee, 206.

parties treating a *void* sale, under the statute, as *valid*, may be effectual for all purposes, 206.

void at the option of the parties, 206.

damages may be recovered on such contracts, when, 201.

license or interest in land, discussed, 211.

Morton, C. J., opinion of, as to a license, 211.

hiring a hall does not carry any interest in the land, 211.

it amounts to a license, 211.

lodgings, agreement for in a hotel, creates a license, 211.

theatre, agreement for a seat in, creates a license, 211.

things attached to the soil, "licensees or purchasers," 212.

revocation of license, when, 200, 208, 212.

cannot be revoked if upon a valuable consideration, 200.

parol license revoked by death of licensor, 208.

or by conveyance of premises, 208.

continues until recalled, 206, 208.

where license is revoked before property is removed, 199.

license cannot be revoked after trees have been cut and title to them has vested in the vendee, 212.

license is irrevocable, after severance of trees, title becomes coupled with an interest, 207.

LICENSE IN THE VENDEE — continued.

license to cut timber protects purchaser from anything done under it, 206.

license to lay an aqueduct across land of licensor may be revoked and cut off, 208, n. 3.

(See **TIMBER AND TREES GROWING.**)

LITTLEDALE, J.

opinion of as to contracts for the sale of growing produce, 160.

LOVE, D. J.

opinion of, as to delivery of goods to a common carrier, 347.

LOWELL, J.

opinion of, on acceptance and receipt under the statute of frauds, 249.

LYON, J.

opinion of, as to part payment, 379.

as to the surrender of a note being payment, 392.

as to contracts generally affected by the statute, 303.

MAINE.

shares of stock held to be within the statute of frauds, 146.

in the sale of certain securities statute does not apply, 149.

where the word "goods" is used in the statute, shares not within, 148.

MANUFACTURE.

definition of, 52, 108, 213, 214.

sale and manufacture, distinction, 40, 48, 50, 79, 102, 112.

what is a manufacture, 36, 109, 213.

contract of manufacture, not of sale, when, 50, 58*a*, 278.

goods, what a manufacture of, 213.

construction of rule where goods entirely manufactured, 34.

garnering of ice a manufacture, when, 213.

chemical changes not necessary in, 213.

"iron" is a manufacture, 213.

"cotton" is, 213.

"lumber" is, 213.

"grinding bones" is, 214.

"splitting timber into staves" is, 214.

pieces designed for shovel handles is, 214.

Champlin, J., opinion of, as to what is a manufacture, 213, 214.

ice companies not manufacturing companies, 215.

Danforth, J., opinion of, as to ice being a manufacture when prepared for sale, 215.

ice made by frigorific effects is a manufacture, 215.

in a manufacture a distinct object is produced, 215, n. 2.

MANUFACTURE — continued.

- goods, when to be of vendor's manufacture, 53, 103.
- case of *Hight v. Ripley*, on the subject of manufacture of goods of a peculiar kind, 53.
- manufacture of book paper, not a contract of sale, 51.
- work and labor, a manufacture, 97, 102, 103, 110.
- statute held not to apply to a manufacture, 101, 102.
- case of *Parsons v. Loucks*, as to a manufacture, 104.
- Gray, C., dissenting opinion of, in that case, 104.
 - where an article is manufactured and shipped according to order, and destroyed by fire, vendor may recover price, 98, 99, 100.
 - property in purchaser from time of notice of completion, 99.
 - vendor's lien for the price, when, 99.
 - when contract an entirety, 100.
 - court of appeals of New York on the subject, 100.
 - rule in England and New York in certain cases, 97.
- case of *Mead v. Case*, discussed, 55.
- contract for a marble monument with an inscription, is a manufacture, 54.
- rule criticised, 56.
- a dissenting opinion, 55.
- misapplication of an established rule, 56.
- what is a monument, 54.
 - manufacture and sale, the English and Massachusetts rule as to, 36.
- goods manufactured in the usual course of business a sale*, 35.
- contract for the sale of goods regularly manufactured by the vendor is within the statute, 34.
- middle course adopted in some states, 42.
- an article made at a place selected by the vendee is a manufacture, 36.
- contract for a manufacture, in some states, held not within the statute, 28, 44.
- manufacture of a carriage, what, 39, 98.
- special action on the case, when, 112.
- articles partly manufactured under an order, not a contract of sale, 112.
- and partly delivered, 41.
- "felt goods," of a particular kind, manufactured, not within the statute, 110.
- the statute does not apply to a special manufacture, 109.
- "stocking shoddy," manufacture of, not within, 109.
- manufacture presumed, when, 108.
- cutting butternut trees into logs, not a manufacture, 183.
- contract for "staves," manufactured from particular lumber, without the statute, 59.

MANUFACTURE — continued.

- rule adhered to in Colorado, 34.
- statute applies where the thing manufactured will result in a sale, 72.
- “cut nails,” manufacture of, 97.
- where an agent contracted for, 97.
- “flour” to be ground out of wheat, contract for work and labor, 58*a*, n. 2.
 - article in course of manufacture and destroyed by fire, loss falls on the maker, 105.
 - after notice of completion of an article, loss falls on vendee, 105.
- where manufacturer furnishes the material, 106.
- agreement to build a carriage from materials partly wrought, not a sale, 106.
- test, difficult to determine, where the labor in the manufacture of an article increases the value, 104.

MARYLAND.

- shares of stock held to be within the statute of frauds, 146.
- “personal property,” in states where the statute so reads, shares of stock are held to be within the statute, 146.
- decisions of Maryland as to contracts for the sale of growing fruit, 176.
- statute of frauds of the state, 188.
- decisions of, accord with the English cases in many regards, 203.

MASSACHUSETTS.

- shares of stock within the purview of the statute, 144, 148.
- statute of, as to consideration in the memorandum, 242, n. 2.
- decisions as to consideration, 242.
- “signed,” word used in the statute, 469.

MEMORANDUM IN WRITING.

- meaning of note or memorandum, 3, 396.
- before the statute of frauds contracts were good without writing, 396.
- the common law principle as to contracts, 419.
- in general the statute leaves the law as it was, 412.
- the legal effect of a contract is the same as before the statute, 419.
- mutuality always necessary, 421, 423, 439.
- certain principles of the common law not applicable to the statute, 451.
- agreements actionable before the statute, actionable now, 399.
- statute adopted a new rule of evidence, 399.
- does not render a contract void if not in writing, 399.
- when does it not, 419.

MEMORANDUM IN WRITING — continued.

efficacy of the statute in relation to memorandum sometimes doubted, 398.

policy of the statute sustained, 398.

the statute affects the modes of proof, 399.

negotiation and the contract, line between them, 419.

what is a note or memorandum under the statute of frauds, 399, 400, 403, 404, n. 2, 405.

legal evidence required of the making of the contract, 396, 399, 409.

language of the statute of the several states, 396.

variation in the decisions, reason for, 397.

action not maintainable unless contract in writing, 399, 402.

not "be allowed to be good," words construed, 400.

Mr. Pollock on the effect of the statute of frauds, 400.

is the contract "void" unless the statute is complied with, 400.

Holland, Professor, upon that subject, 400.

Parsons, Professor, on the same subject, 400.

Dwight, Professor, on the same subject, 400.

Blackburn, Lord, as to the validity of the contract, 399, 400.

contract only void at the option of the parties, 402.

of the party who has not signed memorandum, 422, 423.

"allowed to be good, except," words of the first statute of frauds of New York, construed, 402.

"no contract, etc., shall be valid," meaning of the words, 402.

distinction between the seventeenth and fourth sections, 403.

object of the legislature in adopting the statute, 403, 419.

efficacy of a contract under the statute, 419.

of the memorandum, 403, 406, 447.

Redesdale, Lord Chancellor, as to signing the memorandum, 422.

contract and memorandum, distinct, 404.

form of, 425.

example of a valid memorandum, 403, 406, 437.

essentials of, discussed, 440, 443, 447.

must be complete and show a conclusion, 403, 407, 408.

intention of the statute carried out, when, 447.

Virgin, J., on the subject, 403.

construction of the memorandum, 440.

must be intelligible in terms, 405, 417.

"price" must be stated, 225, 405.

law will fix price, when, 224.

but may be shown, when, 415.

"quantity" to be mentioned, 405.

"person," identity of, 405.

"average weight" intention as to in the sale of cotton, 469.

intention must be expressed, 405.

MEMORANDUM IN WRITING — continued.

- instance of a defective memorandum, 428.
- “parties” must be shown in the memorandum, 406.
- or description of the parties must be, 410.
- time and place of delivery of goods to be stated, 407.
- when they need not be stipulated for, 407.
- contract not void by not stating time of delivery, 414.
- need only be signed by party to be charged, 410, 421, 447, 450.
- can he claim memorandum insufficient, 423.
- the other party must be designated, 410, 423.
- party signing is bound, 419.
- memorandum presumed to contain all the requisites, 411.
- must state the contract with reasonable certainty, 448.
- case of *Salmon Falls Manufacturing Company v. Goddard*, example of sufficient memorandum, 415.
- case of *Justice v. Lang*, as to a memorandum, 440, 447.
- contract can only be impeached by parties to it, 423.
- statute contains no provision to relieve a party who has signed the contract, 450.
- can only be enforced against the party who has signed, 423a.
- courts of equity will enforce such a contract, 450.
- party who has signed is estopped from denying it, 425.
- cannot set up the statute in bar, 421.
- contract taken out of the statute, when, 426.
- nonsuited, plaintiff will be, if he show memorandum incomplete, 423.
- test as to whether the writing embodies the contract, 428.
- example of an incomplete contract, 403, 408, 417.
- essentials of the contract must appear, 443, 447.
- printed bill of sale, sufficient when, 425.
- example of, a contract for the sale of goods, 414, 443, 447.
- statute proposes the probability of the signature of one party only, 450.
- question of compliance with the statute raised when memorandum put in evidence, 446.
- subsequent alteration of a contract, within the statute, 451.
- contract must be gathered from the memorandum, 438, 447, 448.
- effect of the party denying that the memorandum contains the contract, 408.
- memorandum, when to be made*, 404, 446.
 - before action brought, 409.
 - time when made may be shown by parol, 420.
 - statute silent as to delivery of the memorandum, 424.
- letters and documents may constitute a memorandum*, 404, 446.
 - when letters make up a contract, 52, 126, 420, 428, 444.
 - example of, 432, 444.

MEMORANDUM IN WRITING — continued.

of documents, 425, 426.

letters may show a printed bill of sale to be sufficient, 425.

contract in different writings, 446.

rule as to mutual relation of the parties, 426.

a receipt subscribed sufficient, 427.

“unwarranted refinement” as to, not upheld, 427.

sufficient where a letter canceled a contract and referred to an invoice inclosed therein, 428.

“P. S.,” initials in a letter, construed, 429.

Danforth, J., opinion of, as to the essentials of letters together constituting a valid memorandum, 429.

“postscript” to be taken as part of a letter, 429.

price mentioned in the postscript, sufficient, 429.

signature intended to authenticate the writing, 429.

another example of a contract made up of letters, 430, 432, 446.

statute satisfied where contract proved by letters, when, 431, 432

where letters were held insufficient, 433.)

when one document refers to another, deemed incorporated with it, 433.

instance of a contract resting upon sundry letters, 434.

a proposition by letter must be accepted, example, 434.

if a proposition by letter is modified by the other party, there is no contract, 434.

case of counter proposition, 434.

offer to purchase, instance of, 438.

example of an offer and not a sale, 438, 439.

an offer lacks mutuality, 439.

bill and receipt, taken together, constitute a valid memorandum, 427.

what is a valid memorandum, 440.

“subscribed,” statute of Colorado, 427, 474.

consideration need not be stipulated in the memorandum, 403, 407, 447.

consideration not destroyed because party who does not sign is not liable thereon, 440.

Lott, J., opinion of, on the subject, 440.

Ingalls, J., opinion of, on the intention of the legislature as to the memorandum in executory contracts, 440.

a promise void in law no consideration for the promise, 440.

presumptions of law in contracts, 440.

“agreement,” consideration in, 401.

parol evidence as affecting the memorandum, 414, 425.

when parol proof allowed, 403.

to identity of person, 405.

not allowed to connect an unwritten paper with a written one, 462.

MEMORANDUM IN WRITING — continued.

- cannot be resorted to, when, 405, 416, 443.
- when introduced without objection, 402.
- objection to parol proof must be taken before case closed, 402.
- may be introduced when the memorandum is only in part in writing, 408.
- exception to rule that what was said when memorandum was made will be disregarded, 411.
- several writings may be connected by parol proof, 412, 426.
- but see an opposite view on the subject, 433.
- parol evidence may show that something to be done, not included in the memorandum, is included in another paper, and what it is, 412.
- omissions in the memorandum may be supplied by, 414.
- cannot contradict the writing, 414, 436.
- the law will fix a reasonable price, when, 449.
- facts may be applied to the contract, 414.
- place or time of delivery cannot be changed by parol, 451.
- example, where parol evidence was admitted to explain an omission and apply it to the contract made, 414.
- parol evidence may be admitted to identify the subject-matter, 415.
- "quality or degree," parol evidence not admissible as to, 415, 443.
- "phrases and terms" may be explained, 415, 420.
- "price," if not agreed upon, may be shown by parol, 415.
- "quantity" cannot be increased over the memorandum by parol, 416, 443.
- nor can the quantity of the goods be shown, 443.
- "situation of the parties," may be shown, 420.
- and the circumstances generally, 420, 422.
- and that the party sued is the person bound by the contract, 435, n. 1.
- trades, or relative business of the parties, may be shown, 420.
- proof of a contract, and proof of a compliance with the statute, when the question arises, 428, 446.
- proof of facts inadmissible, when, 443.
- compliance with the statute, how proved, 446.
- contract partly written and partly oral will not satisfy the statute, 451.
- if entry of auctioneer relied upon, it must refer to terms of sale, 428.
- new contract cannot be substituted for the original one, 451.
- written contract not to be enlarged by parol, 451.
- parol evidence not admissible to show a different agreement, 419.
- parol proof inadmissible to show that the defendant was in fact the principal, 436.

MEMORANDUM IN WRITING — continued.

where party who had the benefit was the principal, rule as to, 436.
principal liable where he has had the benefit under the contract, 435.

“*bargain*,” word in the statute, 401.

Wald’s Pollock on the subject of bargain, 401.

a bargain by parol is not enforceable, 404.

terms of, disregarded when, 411.

in case of verbal promise of plaintiff, and written promise of defendant, 440.

“*order*,” contract by, 406.

example of *Doughty v. Manhattan Brass Company*, 429.

“who is the person” who ordered the goods, may be shown, 435, n. 1.

when a feigned name is used in the contract or order, 435, n. 1.

order, whether an offer or a contract, 437, 438, 439.

case of *Wemple v. Knopf*, as to offer, 437.

order, where part of orders filled and security demanded, vendor not liable for not filling rest of the orders, 444.

order, where goods are to be manufactured, 445.

not within the statute, contracts or orders to manufacture, 445.

writings connecting the contract may be shown, when, 446.

order, as to the validity of an order for goods, 449.

“we have canceled the order,” effect of the words, 428.

“*delivery of goods*,” where no time is fixed, 413.

reasonable time will be fixed, 413, 414.

surrounding circumstances will govern, 414.

custom will regulate, 413.

rule in Colorado, where the memorandum must be “subscribed,” 437.

when delivery not necessary, 427.

“delivered,” word used in the Iowa statute, 397, n. 3.

the statute does not declare a contract void, 397, n. 3.

goods ready for delivery, statute applies, 397, n. 3.

delivery of the memorandum, 424.

not essential to its validity, 424.

contract corroborative, when, 424.

as to its delivery or non-delivery, 424.

signature, irregular place of, 427.

“across the face of the bill,” effect of, 427.

agent, memorandum by, 97, 435, 438.

an agent may make a contract to bind his principal, 435.

statute satisfied if name of the principal does not appear, 435.

parol evidence may be used to show that A. simply made the contract for B., as agent, 435.

MEMORANDUM IN WRITING—continued.

- agent may be personally charged where he fails to disclose the name of his principal, 435.
- broker's memorandum of purchase, when binding, 498, 500.
- a broker's clerk may sign for the broker, 435, n. 1.
- parol evidence inadmissible to show that defendant was principal where contract made by agent in his own name, instance of, 486.
- distinctions drawn as to liability of agent who does not disclose the name of his principal, 436.
- vendor may elect to hold the agent who does not disclose the name of his principal, when, 436.
- purchase of goods through an agent, 448.
- open account, goods bought by agent, 448.
- contract corroborative, when, 424.
- goods to arrive, purchase of by broker, 474.
- his signature to the memorandum, 474.
- jury, question for, as to memorandum*, 440.
 - inferences of facts to be passed upon by, 440.
 - in executory contracts, 440.
 - "equivocal expressions," a question of fact, 440.
- words and phrases*, in contracts, 418.
 - "bought of," effect of the words, 418, 468, 479, n. 2.
 - "unilateral undertaking," opinion as to, 440.
 - "same to be agreed upon," words in a memorandum, shows something to be done in the future, contract in such case incomplete, 443.
 - where vendee has failed to comply with terms, 444.
 - "sold," when the word is omitted before the firm-name in a bill sold, 448.
 - "terms moderate," will satisfy the statute in an order, 449.
 - the price can be fixed, 449.
 - vendee bound in such case, 449.
 - "average weight" will be deemed intended, where bales of cotton are sold without the weight being mentioned, 469.
 - "I, A. B., agree," statute satisfied where these words are used, 472.
 - "sold John Dodgson," words written in a book, and signed by the vendor, sufficient, 473.
 - "from Richard L. Crupps," where these words were printed it was held sufficient, if recognized, 478.
- initials, sufficient signing, 477.
- memorandum signed in lead pencil, sufficient, 483.
- mark, sufficient, 480, 482.
- memorandum necessary in sale of a crop to be raised, seed is not yet sown, 95.
- in contract for hops growing, 159.

MEMORANDUM IN WRITING — continued.

in sale of furniture, 60.

not necessary in sale of growing crops, when, 163, 164, 212.

where contract is to cut timber, 186.

where A. sells standing trees on his land to B., and B. sells the trees still standing to A., 188.

in sale of cord-wood, cut by seller, 179.

in sale of fixtures, 111.

in contract to manufacture, 99.

METCALF, J.

opinion of, as to pleading the statute of frauds, 582.

MISSOURI.

shares of stock decided to be within the statute, 145.

MORGAN, J.

opinion of, why hops maturing on vines are within the statute of frauds, 161.

MORTON, C. J.

opinion of, as to license in vendee to enter upon land of vendor and remove anything attached to the soil, 211.

NEW JERSEY.

rule of construction as to what contracts fall within the operation of the statute of frauds, 34, 37.

NEW HAMPSHIRE.

"goods, wares, or merchandise," words of the statute of frauds, 147.

promissory notes held not within, 147.

NEVADA.

statute of, as to contracts by telegraph, 453.

NEW YORK AND OTHER STATES.

rule of construction of contracts, 39, 43.

illustration of the rule, 45.

principle of the decisions, 51.

shares of stock not within the statute of frauds, 141.

"goods, chattels and things in action," words of the statute, 147.

"at the time," words of the statute as applied to payment, 367, n. 2.

"memorandum" and "delivery," 367, n. 2.

as to assets, crops, etc., 159.

NINTH REPORT OF HISTORICAL MSS. COMMISSION.

declares Sir Leoline Jenkins to have prepared the sections of the statute of frauds as to wills, 7.

and that Lord Nottingham was active in having the statute passed, 8.
(See **AUTHORSHIP OF THE STATUTE OF FRAUDS.**)

NOTTINGHAM, LORD CHANCELLOR.

- origin of the statute of frauds not attributed to him, 8.
- he drew certain sections of the statute, 8.
- he brought the bill into the House of Lords, 8.
- active in promoting the passage of the statute, 8.
- ninth report of the Historical MSS. Commission says he did much to promote the passage of the statute, 8.
- his opinion in *Ash v. Abdy*, 8.
- his idea of the meaning of the statute, 8.
- considered the father of equity, 8, n. 4.
- he worshiped Lord Hale, 8, n. 4.

ORAL CONTRACT.

- oral contract for the sale of logs, 291.
- to purchase a certain kind of goods not separated from other goods, not sufficient to constitute delivery, 254.
- example of oral agreement to deliver goods, void, 62.
- (See CONTRACTS WITHIN AND CONTRACTS WITHOUT THE STATUTE OF FRAUDS.)

OREGON.

- statute of frauds of Oregon requires the consideration to be expressed in the agreement, 243.
- statute of, as to contracts by telegraph, 453.

PAIGE, J.

- opinion of, on acceptance, 261.
- upon the meaning of the word "subscribed," 468, 475.
- on revision of the New York statute of frauds, 468.

PARK, J.

- opinion of, as to what will amount to acts of acceptance, 266.

PARK, B.,

- opinion of, as to sale of growing crops, 160.

PARKER, C. J.

- opinion of, on the place of contract, 608.
- on the sufficiency of signature to the memorandum, 469.

PAROL PROOF.

- contracts by parol, when valid*, 261.
- what contracts for standing trees may be by, 191.
- parol contract, whereby the owner of land is to cut and deliver timber, is valid, 182.
- Paige, J., opinion of, as to the validity of an unsealed contract to convey pine timber, 196.
- parol agreement to cut timber into cord-wood and deliver it is valid, 182.

PAROL PROOF — continued.

parol contract for property after severance from the soil, 153.

for a crop of hops, 159.

for grass already grown, 174.

for the sale of peaches at a specified price, 176.

conflict of authority, as to parol contracts for growing trees,

fruit or grass, with right in vendee to remove the same, being within the statute, 172.

parol contract to pay for improvements on land, 114.

not taken out of the statute by delivering a bill containing terms of sale, 307.

what will amount to possession of goods, 265, 269, 274.

place or time of delivery cannot be changed by parol, 451.

parol license to cut timber for a fixed price for stumpage, is valid, 205.

license is not covered by the statute of frauds, 205.

parol license is revoked by death of the licensor, 208.

agent, parol authority of, 487.

where he acts for one party, 487.

where he acts for both parties, 487.

parol proof inadmissible to show that defendant was principal, when, 436.

(See EVIDENCE.)

PART PAYMENT.

part payment is something beyond the contract, 3.

effect of, 16.

when earnest is given, 16.

must be made, 17.

(See EARNEST AND PART PAYMENT.)

PARTY OR PARTIES.

the words, how construed, 464.

PERKINS, J.

opinion of, on delivery of goods to carrier, 349.

PERJURY.

statute of frauds aims to prevent perjury, 24.

early laws against, 13.

statute of frauds revived certain laws as to, 13.

legislature intended to guard against perjury, 144.

danger of, as great in sale of shares of stock as in goods, 145.

danger of, as great in auction sales, as in others, 18, 520.

(See STATUTE OF FRAUDS.)

PIERPONT, J.

opinion of, as to contracts to cut and deliver trees in a changed condition, 183.

PLACE OF CONTRACT.

- contract valid where made, valid everywhere, 603.
 - when does the place of contract govern, 85, 606.
- lex loci*, the nature, validity and construction of contracts governed by, 607.
 - as to remedies under a contract, 603.
 - when the *lex loci* governs, 606, 607.
- Parker, C. J., opinion of, upon the *lex loci*, 608.
- English rule as to place of contract, 609.
- a rule of evidence, some statutes lay down, 603.
- the contract void, by the statute of some states, 603.
- statute of frauds of states declaring a rule of evidence, 603.
 - of statutes declaring the contract void, 603.
- distinction under the statutes of the several states, 604.
- Dwight, Professor, as to rule of place of contract, 604.
 - rule laid down by an author criticised, 605.
- case of *Marie v. Garrison* on subject of *lex loci*, 604.
 - doctrine that place of contract and place of trial are to be satisfied, advanced by a writer on the statute of frauds, 605.
- question discussed, 605.
- memorandum and the contract, distinction between, 605.
- the Massachusetts doctrine as to, 605.
- "shall be void, unless," etc., rule adopted as to place of contract in New Jersey, 606.
- Dacosta v. Davis*, as to application of the statute in sales out of the state, and place of contract, 606.
 - oral contract made where the statute of frauds does not prevail can be enforced in a state where the statute exists, 606.
 - as to the place of contract and remedies under it, 606.
 - rule as to enforcement of contracts, 607.
- Story, J., as to remedies under contracts valid where made, 607.
- where a contract is made with reference to another state or country
 - the intent will govern as to its validity, 607, 608.
- the legal presumption as to place of contract, 603.
 - place of delivery, law of place of delivery will govern, when, 609.
- the law as to the *lex loci* and *lex fori*, 609.
- the *lex fori* governs as to limitation of actions, 607, 608.
 - agent, acts of in making a contract in another country, 609.
 - acts of the lawfully authorized agent governed by the same rule as acts of principal, 609.
- a small beacon may serve to light the lawyer in his profession, 609.
- (See *LEX LOCI*.)

PLEADING THE STATUTE OF FRAUDS.

- a declaration at common law, 582, 599.
- statute of frauds did not alter the rules of pleading, 582, 592, 599.

PLEADING THE STATUTE OF FRAUDS — continued.

rules of evidence changed by the statute, 582, 592, 599.

pleading the statute, 582, 584, 596, 597.

to be available, must be pleaded, 584, 586, 596.

the statute a personal defense, 583.

the party to the transaction only can plead it, 583.

Metcalf, J., opinion of, upon pleading the statute, 582.

the writing and not the allegation matter of proof, 582, 583.

pleading, bad on demurrer, when, 594.

as to an action for goods sold and delivered, 584, n. 5.

defendant denying the contract, effect of, 584.

where it appears in the complaint that the contract was in writing, it is necessary to plead the statute, 243, 598, 599.

where it does not appear by the complaint that the contract was in writing, it is not necessary to plead the statute of frauds, 584, 585, 589, 593.

when is it necessary to plead the statute, 243, 586, 598, 599.

Lake, J., opinion of, upon the subject, 583.

pleading, where the contract must have been in writing, 594, 599.

where contract presumed to be in writing, 588.

a general denial sufficient, when, 584, 597.

statute to be specially pleaded, 596.

rules of evidence where the statute is pleaded, 585.

case of *Parker v. Wormser*, action to recover a balance due on sale of bonds, statute must be pleaded, 586.

statute not available to the plaintiff, when, 586.

no defense, when, 588.

defense of statute may be waived, 586.

where statute is pleaded it is necessary to prove that the contract was in writing, 588.

Poland, J., opinion of, upon pleading the statute, 589.

pleading a special promise, 591.

case where general issue is pleaded, 591, n. 3.

Stone, A. W., J., opinion of, as to declaring upon the statute, 591.

sale admitted if not denied, 595.

“statute has not changed the rule of pleading,” meaning of the expression, 592, 599.

Worden, J., opinion of, upon the same subject, 592.

declaration, good when, 588, 592, 598.

complaint on a parol promise, when does it fail to state a cause of action, 592.

statement of what facts sufficient, 592.

pleading the facts not necessary, when, 595.

PLEADING THE STATUTE OF FRAUDS — continued.

not bound to plead the statute, when, 598.

contract presumed to be in writing, when, 588, 595.

not necessary to allege a contract to be in writing, 588.

presumption arises that no writing was signed, when, 593, 594, 595.

Buskirk, J., on pleading the statute, 594.

appeal in cases involving the statute, 587, 596.

the statute as a plea or defense is not available on appeal unless pleaded, 587, 596.

case of *Johnson v. Latimer*, involving defense of the statute on appeal, 596.

no cause for reversing a judgment where part of a plea is stricken out which did not harm the defendant, 600.

waiver of the statute, 590, 598, n. 1.

contract proved without objection, is valid, 590.

statute not waived by not being pleaded, 598.

case of *Wentworth v. Wentworth*, involving question of waiver and pleading statute, 598.

demurrer, when is the declaration not demurrable, 584, 589.

when is the pleading subject to demurrer, 594, 595.

statute not available by demurrer, 584.

demurrer, code of Indiana, 594.

Dixon, J., on pleading in *Robbins v. Deverill*, 595.

where the answer admits the indebtedness, 595.

instance of a defective pleading, 598, 599.

case of *Smith v. Auerbach*, complaint materially defective, when, 599.

pleading, where it alleges a written contract, the contract must be filed, 594.

Spencer, J., on the statute and pleading, 602.

in case of goods bought by sample, 314.

nonsuit may be submitted to where no set-off is pleaded, 601.

or before the jury return a verdict, 601.

or before the court makes decision, 601.

non-readiness to pay no ground for, 602.

"readiness to pay" must be alleged, 602.

proof of readiness to pay, necessary, 602.

actual proof of, need not be given at the trial, 602.

avowment of purchaser, in case he sues for non-delivery, must be a willingness to pay, 602.

license, may be pleaded without deed, 200.

of the defense to a license, 209, 210.

POLAND, J.

opinion of, on pleading the statute of frauds, 589.

POLLOCK, C. B.

- rule of, as to construction of contracts, 32.
- as to when Lord Tenterden's act applies. 32.

POLLOCK, J.

- opinion of, on the effect of the statute of frauds, 400.

POSTSCRIPT.

- a postscript is part of a letter, 429.
- even if not signed, 429.
- Danforth, J., on the meaning and effect of a postscript, 429.
- "P. S." in a letter, construction of, 429.
- (See MEMORANDUM IN WRITING.)

PRICE OR AMOUNT.

- must be in money, 26, 218.
- a reference to the bible, 26.
- amount or price in contracts of sale, 217, 507.
- price under the common law, 283.
- by the civil law, language of the Institutes, 217.
- price required to be fixed, 217, 221.
- price, when to be paid, 299, n. 1.
 - statute of frauds, price or amount under, 217, 232.
 - certainty of price necessary, 218
 - may be implied, 218.
 - as to reasonable price, 218.
- no contract until price is settled, 218.
- when deemed settled, 218, 331.
- must be stated in contract, 218.
- implies cash down or credit, 218, 232.
 - when no price is fixed, 218.
 - reasonable price, when to be averred, 218.
 - demurrer lies if price not averred, 218.
- "price of ten pounds sterling," words of the English statute, 219.
- "value of ten pounds," words of Lord Tenterden's act, 219.
- under the cases, *value*, stands in place of "price," 219.
- the statutes are to be read together, 219.
- Lord Tenterden's act removed all doubts as to executory contracts
 - falling within the operation of the statute, 219.
- it removed doubts as to meaning of section seventeen, 219.
 - statute of frauds of the states as to price or amount, 220.
 - "for the price of," words of some statutes, 220, 226, 227.
 - "to the amount of," words of the Georgia statute, 220.
 - "price not less than," words in the statute of Oregon, 220.
 - "thirty dollars or more," in the statute of Maine, 220.
 - no mention of price or amount in the statute of frauds of some
 - states, 220.

PRICE OR AMOUNT—continued.

- price or amount named in the statute of Arkansas, California, Colorado and eighteen other states, 220, n. 3.
- “sale of personal property,” words of the Connecticut statute, 220, n. 3.
- price must be in money or an obligation to pay, 221, 225.
- payment of part of price binds the contract, 221.
- vendee may recover the goods, and vendor the price, in such case, 221.
- jury may fix the price, when, 222, 223, 231.
- when price is not mentioned, 222, 227.
- when there is a mistake as to price, 231.
- may fix the amount, when, 222.
- “to the amount of,” where statute so reads jury may determine, 222.
- reasonable price, jury to fix, 234.
- “for the price of,” where statute so reads, and no price is stated in the contract although stipulated for, jury cannot pass upon amount, 222, 226.
- contract not enforceable, when price is not stated in the writing, 222, 225, 226, 228, 230, 454.
- where price was agreed upon, 225, 227.
- price, if not expressly agreed upon, may be determined by parol proof, 222, 223, 224, 415.
- law will determine price, 224, 234.
- the actual value may so be shown, 222, 227.
- “reasonable price,” when, 222, 227, 233.
- “reasonably worth,” as applied to price, 224.
- “moderate terms,” goods to be so shipped, satisfies the statute, 223, 234, 449.
- jury may fix terms in such a case, 223, 234, 449.
- fixed by some proper standard, 227.
- “shipping price at” a given place, not sufficient to satisfy the statute, 223, n. 1, 449.
- quantity, variance as to, fatal to contract, 223, n. 4, 229, 230.
- or when quantity not mentioned, 229.
- price, unless the statute provides that it need not be stated, contract defective without stating it, 225, 227, 229.
- oral evidence cannot supply deficiency, 225.
- memorandum not defective when contract is executory, 82, 170, 225, 227.
- parol evidence admissible in cases of contracts not within the statute, 225, n. 2.
- not admissible to vary written contract, 228.
- Campbell, J., opinion of, on the subject of price, 227, 228.

PRICE OR AMOUNT—continued.

quantum valebat, recovery cannot be had in, where contract is silent as to price, and there is parol evidence as to the price, 227.

writing as necessary for a reasonable price as any other, 227.

indebitatus assumpsit cannot be maintained, when, 229.

special action on the case, when, 229.

delivery is defective where something remains to be done to ascertain price or quantity, 230, 230, n. 1.

where property is destroyed, rule as to quantity and price, 230.

“*stoppage in transitu*,” when a question, 230.

intention of the parties must show a complete sale to satisfy the statute, 230.

mistake as to price, may be passed upon by the jury, 231.

where ignorance of the language is shown, 231.

valuers, when price to be fixed by, 232.

constitutes a part of the contract, 232.

“reasonable price,” when contract is for, 233, 234.

value and market price, difference as to, 233.

“*market price*” deemed a proper evidence of value, 233.

not a legal presumption of fact of value, 233.

market price is made by “buying and selling,” 233.

“moderate price,” meaning of, 234.

statute applies where several purchases are made at a given sale, if they amount in the aggregate to more than the price or amount named in the statute, 235.

case of successive lots purchased at a sale, 235.

construction of such contract, 235.

another example, where successive purchases were made, 236.

Abbott, C. J., opinion of, on successive sales, 236.

statute must be complied with where successive purchases amount to more than the sum mentioned in the statute, 236.

“except the buyer shall accept part of the goods sold,” rule as to clause of the statute, 236.

another example of successive purchases at a sale, 236, n. 1.

where payment is made by purchaser, 237.

rule and exception where different lots are purchased at an auction, 237.

where successive lots are bought at auction to be paid for on delivery, and part of the goods have been paid for and taken away, rule, 237.

price, for flax straw to be raised, 63.

for barley to be raised, 166.

PRIM, C. J.

opinion of, as to consideration in the agreement, 243.

PROPERTY.

passing of, where nothing is said about delivery, 17.

See WORK AND LABOR; CONTRACTS WITHIN THE STATUTE; CONTRACTS WITHOUT THE STATUTE.)

RAPALLO, J.

opinion of, upon acceptance under the statute of frauds, 292.

RECEIPT, ACTUAL, AND DELIVERY OF GOODS.

delivery and receipt at common law, 283.

essentials of a sale at common law, 283.

delivery correlative of receipt, 283, 286, 287.

"actual receipt" under the statute of frauds, 283, 284, 286.

what will constitute actual receipt, 113, 277, 283, 285.

language of the statute unequivocal, 249, 283, n. 2.

"delivery" not used in the statute, 286.

receipt not complete without acceptance, 239, 250, 252, 283, n. 2.

example of, 276.

necessary in a work of art, 122.

delivery, Dwight, C., opinion of, as to delivery, 269.

in executory contracts, 61, 80, 122, 262, 264, 286, 290.

what will amount to, 300, 331.

part of goods manufactured, case within the statute, 41, 52, 58, 62.

special agreement as to delivery, 47, 76, 80, 277, 284, 291.

delivery of goods with slight alteration, 70, 296.

time of delivery governs, when, 51, 76.

place of delivery, 302.

goods made, to be paid for on delivery, if destroyed by fire before notice of their completion, loss falls on vendor, 105.

when delivery and payment are to be simultaneous acts, 45, 99, 305.

goods sold by weight and measure, effect of, 299.

crop of corn, how delivered, 163.

delivery validates a contract, when, 61, 276, n. 2, 287, 303.

option of vendee necessary, 251.

oral agreement to deliver, void, 62, 254, 291.

when goods placed in possession of buyer, 113.

delivery, goods must be separated for identification, 299.

delivery, article must be in condition for, at time of the sale, when, 74.

different phases of delivery, 286, 295.

as to future delivery of goods in existence, 44.

delivery of goods to bailee, 300.

"*delivered*," word used in Iowa statute in place of acceptance, 245, n. 7, 397, n. 5.

circumstances tantamount to delivery controlling, 306.

RECEIPT, ACTUAL, AND DELIVERY OF GOODS—continued.

- delivery must be according to circumstances, 254, 284, 293.
- indicates transferring title, 286, 287.
- receipt*, definition of, 246, 284, 287.
 - goods may be received and not accepted, 249.
 - may be for special purpose, 259, 284.
 - distinction between acceptance and, 246.
 - English rule as to, 285.
 - acceptance and receipt necessary to take case out of the statute, 245.
 - receipt by one of several joint purchasers, valid, 285.
 - intention governs, when, 285, 286, 287, 307.
 - where vendee is deprived of his option to receive, 251.
 - possession must be unequivocal, 286, 308.
 - qualified delivery not sufficient, 307.
 - concurrent possession not admissible, 286.
 - when may receipt occur, 287, 295.
 - "unless the purchaser shall receive," reads the Indiana statute, 287.
 - requirements of, 287.
 - receipt must be with intent, 287, 303.
 - evidence of, 233, 331.
 - receipt of part of goods satisfies the statute, 287, 293, 296.
 - when it does not bind vendee, 258.
- part delivery and acceptance, 287, 288, 294, 300.
- part delivery, effect of, 296, 585.
- Hawley, C. J., on change of possession, 283.
- what will overthrow the evidence of, 283.
- evils of not enforcing the statute, 288.
 - the statute a wise measure, 305.
 - delivery as soon as practicable, terms of sale, 289.
 - contract for the sale of a "band of cattle and horses," 289, 305.
 - Boise, J., opinion of, in construction of the statute as to delivery, 289.
 - elements of a binding contract, 289.
 - case of *Kerhof v. Atlas Paper Company* on delivery, 290.
 - "dead wood," contract for, and part payment, 290.
- "accept and receive," reads the Wisconsin statute, 290.
- memorandum dispensed with, when, 290.
- delivery and acceptance under a sale by a broker, 499.
- "at the time," payment must be made, 290, 293.
 - bailee, delivery of goods to, 300.
 - oral contract for the sale of logs, statute applies, 291, 305.
 - case of *Hanson v. Roter*, delivery does not pass title before acceptance, when, 291, 292, 293.
 - offer to deliver goods, what sufficient, 299.

RECEIPT, ACTUAL, AND DELIVERY OF GOODS — continued.

where chattels are to be delivered at a stated place, 291.

contract in writing enforceable, when, 292.

where the contract is oral, 312.

case of *Caulkins v. Hellman*, 292.

when delivery will take case out of the statute, 292, 294, 312.

res gesta, what is part of, 292.

receipt may be subsequent to agreement, 295.

when damages will lie for failure to deliver, 293, 294, 295.

Earl, J., opinion of, as to a delivery to answer requirements of the statute, 293, 299, 306, 308.

goods must be set apart to constitute delivery, 299.

where delivery is to be made at different times, 294.

modification of an agreement to deliver, 296.

"accept a part," words of the Arkansas statute, 294.

contract entire, delivery of part will validate contract, 294, 295, 296, 585.

exception to the rule where vendee waives agreement to deliver entire purchase at one time, 297.

vendee has not received goods where vendor retains a lien on them, 249.

vendee liable for price when he receives part of goods under an order on warehouseman, 298.

goods must be susceptible of identification, 299.

case of goods sold by number, weight, or measure, 299, 306.

conditions, until complied with, goods are at risk of the vendor, 299, 306.

delivery, where a portion of lumber sold and delivered is bought back by the vendor, 301.

when does title pass, 301.

a resale is within the statute, 301.

bailee, delivery of goods to, 300.

place of delivery, burden of proof upon vendee to show place other than vendor's store or factory, 302.

rule, though the seller has not the goods on hand at the time, 302.

legal presumption as to place of delivery, 302.

vendor's place of business, 302.

contract validated, when, 303.

Lyon, J., opinion of, as to delivery to pass title, 303, 307.

goods delivered at a place designated, 303.

under an oral contract, 303, 305.

shipment of goods under verbal order at risk of vendor, 312.

vendee liable in such case, when, 312.

payment tantamount to, 304.

title has passed when property is paid for, 304.

RECEIPT, ACTUAL, AND DELIVERY OF GOODS — continued.

seizure of the property under execution, void, 304.

bill of goods sent not equivalent to delivery, 307.

marking goods not, 307.

parol contract, where nothing is paid, 305, 306, 307.

Ryland, J., opinion of, upon delivery and the statute, 305.

statute contemplates acts, 305.

goods marked with consent of vendee not a delivery, 307.

words insufficient, 305, 306.

Kent, C. J., opinion of, upon delivery, 306.

where something is to be done before delivery, 306.

if property destroyed before conditions performed, loss falls on the vendor, 306.

circumstances tantamount to delivery, when, 306, 308, 331.

REDESDALE, L. C.

opinion of, as to requiring both parties to sign the memorandum, 422.

ROMAN LAW.

as to written evidence, 13, n. 2.

earnest under the Roman law, 359.

RYAN, C. J.

opinion of, as to contracts of sale for standing trees, 195.

RYLAND, J.

opinion of, on delivery and acceptance of goods, 305.

on the statute of frauds, 305.

SALE.

meaning of the word sale, 46.

Mr. Benjamin's opinion of a sale, 73.

case of *Towers v. Osborne* considered right, 77.

Lord Loughborough's opinion of the case, 77.

"sale," great stress laid upon the word, 51.

a test, between a sale and work and labor, 104.

distinction between, 30, 46, 65, 66.

instance of a sale, 36, 63.

statute respects a sale, 46.

where labor is an incident to, 32, 44.

Story, J., opinion of, as to a sale, 32.

flour purchased of a miller, a sale, 86.

"artificial teeth," contract for, 88.

contract for "malt," whether a sale, 58.

instance of a peculiar contract, 73.

simple sale without writing, 45.

English doctrine of sale, 46, 73.

SALE — continued.

- common sense and custom regulate human transactions, 27.
- case in supreme court of the United States, 71.
- sale of opera tickets*, statute does not affect, 132.
- not a sale of an interest in land, 132.
- damages may be recovered where a party is deprived of seats at an opera purchased, 132.

SALE AND RESALE.

- where A. sells trees standing on his land to B., and B. sells such trees as are not removed and still standing to A., 188.
- (See TIMBER AND TREES GROWING; CONTRACTS WITHIN AND CONTRACTS WITHOUT THE STATUTE.)
- how far the act of reselling goods purchased by sample will amount to acceptance, 317.
- (See SAMPLE, GOODS SOLD BY.)

SAMPLE, GOODS SOLD BY.

- elements in sale by sample, 310, 312.
- as a specimen of the goods, 309, 311.
- when accepted as part of the bulk, 309, 311.
- vendee must pronounce goods satisfactory, 309.
- case of *Remick v. Sandford* as to test of acceptance in such cases, 310.
- Devens, J., opinion of, as to validity of sale of goods by sample, 310.
- acceptance may satisfy the statute, and yet evidence be admitted as to terms of the contract, 310, 321.
- as to option to reject goods, 315.
- buyer may accept and yet reject goods if not equal to sample, 310, 321, 325.
- in case of warranty, 310.
- intention, an element in sales, 310.
- barley sold by sample, case of, 325.
- "cotton" sold by sample, 331.
- order on warehouseman a delivery, 331.
- sample or order, purchase by, vendee has right to ascertain whether goods correspond with, 258, 325.
- custom of trade in sale by, 325.
- mere delivery of sample, in absence of a custom, will not amount to an acceptance of part, 311, n. 1.
- after goods are bought, a delivery of a sample from the bulk is a part delivery, 311, n. 1.
- "grain," bought by sample, case of *Taylor v. Mueller*, 312.
- order on warehouse keeper, 312, 314.
- delivery order issued and followed by inspection of the goods, and rejection, does not make an acceptance, 312.

SAMPLE, GOODS SOLD BY—continued.

- “void,” contracts are declared, by Wisconsin statute, unless, etc., 313.
- where goods do not correspond with sample proof of actual acceptance necessary, 313.
- case involving question of, 314.
- where bulk is equal to sample, and vendee has exercised acts of ownership over the goods, 314.
- delay in rejecting contract in sale by sample, effect of, 314.
- evidence of such delay, 314.
- evidence of delivery and acceptance within exception of statute, 314.
- statute does not affect, when, 314.
- effect of entry of goods in warehouse keeper’s books, 314.
- rescission and sale, what, 314.
- acceptance follows acts of seller, 316.
- may precede delivery, 316.
- English rule as to sales by sample, 317, 319.
- as to acceptance in, 322.
- where goods are bought by sample and resold before delivery, 317, 324.
- important case of *Morton v. Tibbett*, 317.
- where goods are equal to sample, 317.
- when not equal to sample, 317.
- acceptance declared where goods are resold by purchaser before delivery, 317.
- but rejected on account of short weight, 317.
- rule of acceptance in given cases, 317.
- acceptance to let in parol evidence, different from the acceptance in fulfillment of contract, 317, 319.
- Campbell, Lord, opinion of, upon the subject of acceptance on sale of goods by sample, 317.
- compliance with contract, evidence as to, 317.
- evidence sufficient to justify jury in finding acceptance, distinction drawn, 317, 319.
- circumstance of reselling goods purchased by parol, 317.
- acceptance of the part delivered, effect of, 317.
- a sub-sale *per se* is not sufficient to constitute acceptance, 317.
- rule laid down in a noted case, questioned, 318, 321.
- part acceptance must be equivalent to part performance, 318.
- acceptance means no right to reject the part accepted, 318.
- does not preclude objection to quality or quantity, 318, 319, 321.
- agreement that bulk shall be equal to sample, 319.
- case of *Kibble v. Gough*, 319.
- “not equal to sample,” effect of receipt given for barley in those words, 319, 324.

SAMPLE, GOODS SOLD BY — continued.

- when an acceptance notwithstanding notice, 319.
 - where jury find bulk equal to sample, 319.
 - sufficient evidence in such case, 319.
- Bramwell, L. J., opinion of, upon acceptance of goods sold by sample and right of objection to such goods, 319.
- acceptance must recognize the contract, 319, 323.
- case of *Morton v. Tibbett* discussed, 319.
 - where goods are dealt with and still the right of rejection exists, 319.
- case of *Page v. Morgan*, where, under a verbal agreement, goods were sent to the mill of vendee and there pronounced “unequal to sample,” but jury found an acceptance, 320.
- Brett, M. R., opinion of, upon the legal effect of vendee receiving and examining goods sold by sample, 320.
 - what acts amount to an admission of the making of the contract, 320, 322.
 - acceptance, examination of a portion of goods sent to see if they correspond with sample, held to be, 320.
 - a delivery but not an acceptance, when, 320.
 - jury justified in finding acceptance, when, 320.
- cases of *Morton v. Tibbett*, and *Kibble v. Gough*, discussed and criticised, 321.
- acceptance of goods sold by sample may satisfy the statute and yet not preclude the vendee from rejecting the goods, 321.
- where jury find goods not equal to sample, 321, 324.
- effect of such verdict, 324.
- where they find bulk equal to sample, rule, 321.
- Baggallay, L. J., opinion of, as to acceptance of goods sold by sample, 321.
- Bowen, L. J., opinion of, on the same subject, 321.
 - discussion of the question where the buyer deals with the goods as to recognize the existence of a contract, 321, 322.
 - case of *Rickard v. Moore*, acceptance on a “secondary point,” 321.
- no acceptance where the purchaser refuses to allow goods bought by sample to remain on his premises, 322.
- is notice of rejection equivalent to a refusal to permit goods sent to remain on vendee’s premises, 322.
- res gestæ*, notice of rejection of goods, a part of, 322.
 - that bulk shall be equal to sample is implied, when, 322.
 - a violation of sound commercial usage and the spirit of the statute, 322.
 - is an admission of the making of a contract equivalent to acceptance, 322.

SAMPLE, GOODS SOLD BY — continued.

by the adoption of such a rule in regard to part payment many cases would be overthrown, 322.

Blackburn, J., opinion of, upon what will amount to acceptance, 323.

reasons for non-acceptance immaterial, 323.

question is whether vendee has accepted, 323.

wool sold by sample and delivered at railway station, effect of, 324.

immediately notice given that bulk does not correspond with sample, effect of, 324.

overt act required where contract is verbal, 324.

cases where goods are found equal to sample, distinguished, 324.

SANDERSON, J.

opinion of, as to a sale of growing crops being affected by the statute of frauds, 163.

SHAW, C. J.

opinion of, as to shares of stock being embraced within the statute of frauds, 144.

on contracts of sale, 31.

as to note or memorandum of auctioneer, 576.

as to auction sales generally, 575.

SHEPPARD'S TOUCHSTONE.

authorship of the Touchstone, 16, n. 1.

Justice Doderidge the author, 16, n. 1.

edited by Edward Hilliard, 16, n. 1.

illustration from, as to the common law doctrine of contracts, 16.

SIGNATURE.

"signed," meaning of, 474.

"subscribed," meaning of, 465, 474.

signed; when used in the statute of frauds, it is sufficient, if

signature appear anywhere in the memorandum, 464, 469.

immaterial where signature appears, 465, 470.

immaterial as to form of signature, 479.

decisions of New York before the statute was amended,

substituting word "subscribed" for "signed," 465.

intention of the legislature, 467, 468, 475.

signature not required to be literal or formal, 467.

signing does not mean subscribed, 467.

large license formerly taken in the decisions, 467.

"signed," used in the Massachusetts statute, 469.

example of sufficiency of, 469, 471.

Kent, Chancellor, on the sufficiency of, 470.

SIGNATURE — continued.

- of signature with pencil, 483.
- before the statute of New York was amended, any mention of the name sufficient, 467, 470.
- “bottom or top,” or in the body of the writing, 469, 471.
- law looks to the substance and not the form, 471, 473, 480.
- form of signature immaterial, 479.
- a “substantial signing,” sufficient in some states, 465, 466, 479.
- English cases as to place of signature, 465.
- intention of parties, where signature does not appear at the end, 466.
- intention, when it can be inferred, governs as to validity of memorandum, 470.
- intention must be gathered from the writing, 464.
- “signing,” imports an informal writing, 482.
- “subscribed,” when the word is used in the statute in relation to the sale of goods, etc., the signature must appear at the end of the memorandum, 464, 465, 479.
- “subscribed” substituted for word “signed,” 465, 467, 468.
- word “subscribed” clearly defined in meaning, 468.
- strict construction given to it, 464, 465.
- case of *James v. Patten*, on subscription of the memorandum, 468.
- Paige, J.*, on the revision of the statute as to signature, 468.
- “subscribed,” word also used in the statute of Colorado, 427.
- bottom or end of the contract, signature must be where the word “subscribed” is used, 474.
- subject of signature elaborately discussed in *Davis v. Shields*, 474.
- Walworth*, Chancellor, opinion of, upon the requirements of the statute as to place of signature, where the word “subscribed” is used, 474.
- Verplanck*, Senator, on the same subject, 474.
- statute not satisfied by a bare subscription in the body of the memorandum, 474, 476.
- example of, 476.
- mistake of judgment of Senator *Paige* as to meaning of word “subscribed,” 475.
- “popular meaning” intended by the legislature, 475.
- statute cannot be circumvented, 476.
- rule of construction of the statute as to signature, 476.
- jury to determine the question of intention of the parties where signature appears in the body of the memorandum, 466, 473.
- “party or parties,” signature of, 465.
- parties must assent to the contract, 474.
- both parties need not sign, 474.

SIGNATURE — continued.

signature of party to be bound, sufficient, 422, 423, 423a, 447.

“postscript,” signed or unsigned, is a part of a letter or memorandum, 429.

“P. S.” in a letter, construed by Danforth, J., 429.

broker’s memorandum sufficient, when, 474.

purchase of goods to arrive, contract by broker, 474.

signature of the agent is the signature of the principal, when, 472, 489.

signature of a broker in his book, effect of, 496.

what is a sufficient signing, 471, 478, 491.

bill of parcels, written under the direction of the vendor, sufficient, 471, 491.

“I, A. B., agree,” words held to be sufficient, 472.

words in a book, “sold John Dodgson,” and signed by the seller, satisfies the statute, 473.

“initials,” signature by, sufficient, 477.

where initials only appear in the memorandum, it must be made to appear that it was so written with the intention to be binding, 477.

printed signature, sufficient, 478, 479.

“From Richard L. Crupps,” words printed, sufficient when recognized as valid, 478.

printing is writing, within the meaning of the statute, 482.

habit of party signing may govern as to validity of signature, 479.

sealing without signing, effect of, 479.

a “mark” is sufficient if intended to confirm the contract, 480, 482.

writing will prevail over printed matter in case of conflict between them, 481.

what is not a sufficient signing, 471.

“your affectionate mother,” a letter so signed, is insufficient to satisfy the statute, 471.

materials used in signing, 480, 482, 483.

pencil or ink, sufficient, 480.

stencil or stamp, sufficient, 480.

statute of frauds is silent as to materials to be used in writing signature, 482, 484.

materials used governed by usage, 482.

lead pencil mostly used and is sufficient, 483.

manner of impressing letters, no part of the definition of writing, 484.

various materials have been used in writing in the different ages, 484.

“stones” have been used, 484.

SIGNATURE — continued.

- “metals” have been, 484.
- “bark and leaves” have been, 484.
- calamus or reed, as an instrument in writing, 484.
- styles of iron, or bone, and reeds and quills, have been used in writing, 484.
- Job, writing in the time of, 484.

SOUTH CAROLINA.

- statute of frauds of, same as the English statute, 69.

SPENCER, J.

- opinion of, on the meaning of the statute of frauds, 602.

SPRAGUE, J.

- opinion of, as to contracts of sale of an interest in growing crops, 162.

STATES.

- Lord Tenterden's act, declaratory of the statute of frauds in certain states, 25, n. 1.
- some courts guided by English precedents, 42, 115.
- section 17, substantially in some states, 74.
- statute of frauds of the several states and territories in relation to sales of goods, wares and merchandise, chattels and things in action, and personal property generally, *Appendix I*.

STATUTE OF FRAUDS.

- history of the statute of frauds, 2.
- preamble of, 2.
- when passed, 2.
 - the product of several judicial minds, 5.
 - has several progenitors, 6.
 - received the sanction of the bench, 6.
 - introduced into Parliament long before its passage, 6, n. 3.
 - when first introduced, 9.
 - long time in preparation, 7, 9.
- sections in relation to wills, prepared by Sir Leoline Jenkins, 7.
- sections as to trusts and devises by Lord Nottingham, 8.
- he promoted its passage through Parliament, 8.
 - statute referred to several committees, 9.
 - returned to the House of Lords, 9.
 - receives the royal assent, 9.
 - goes into operation, 9, n. 1.
 - intended to prevent mistakes and perjury, 3.
- draws the line of demarcation between negotiation and contract, 3.
- what changes were wrought by, 24.
- no change wrought as to the sale of growing crops, 154, 177.

STATUTE OF FRAUDS — continued.

- acts required to show the completion of a contract, 3.
 - the statute a safeguard in business dealings, 4.
 - as to perjury and mistakes, 24.
 - does not declare a contract void, 4.
 - prescribes a new rule of evidence, 4, 24, 29.
 - when is an oral contract established, 4.
- encomiums upon the statute, 2, 305.
- early objections to, 11.
- various criticisms upon, 10, 121.
- objections of Mr. Justice Stephen, 10.
- inartificially drawn, 10, 11.
 - many criticisms unfounded, 11, 121.
 - Lord Kenyon's opinion of the statute, 11.
 - Abbott, C. J., opinion of, 11.
 - it settled many legal principles, 12.
 - a meritorious law, 11.
 - checks reckless litigation, 11.
 - prevents uncertainty in contracts, 84.
- embarrassment of the judges in its early history, 12.
- early constructions of the statute, 12, 42, 46, 75.
- modern interpretations of, 12, 21, 75.
- statute strictly construed, 42, 74, 75.
 - relates to matters of ordinary business, 12.
 - lightens the burdens of courts, 12.
- whether the statute is productive of good, questioned in a Minnesota case, 121.
- statute revived certain laws as to perjury, 13.
- early laws against perjury, 13.
- well adapted to the times, 13.
- a protection against fraud, 133, 305.
 - gives no new efficacy to written contracts, 13.
 - requires more than oral evidence, 13.
 - evidence of the contract must be in writing, 409.
- words of the English statute, 25, 219.
- stamp act of 23 Geo. 3, reference to, 161.
- Lord Tenterden's act, in connection with the statute, 4.
- "value" for "price," substitution of word, 25.
 - extensive litigations occasioned by the statute, 8.
 - refined and artificial distinctions, the cause, 45.
 - Chancellor Kent and others on cost of litigations, 8.
 - statute reasonably construed, 21, 75, 86.
- a liberal construction commended, 75.
- contemplation of the parties governs, 95.
- Lord Tenterden's opinion as to, 21, 121.
- a rule of construction, 121.

STATUTE OF FRAUDS — continued.

rejected refined distinctions, 21, 23.

jurisprudence can only contain near approximations of equity,
12, 121.

statute of frauds not an inflexible one, 308.

what contracts are embraced within the statute, 15, 18, 83.

section 17, broad enough to include executory contracts, 18.

in the several states, 74.

affects executory contracts, 15.

includes auction sales, 18.

contracts void when, if the statute is not complied with, 21, 399.

English rule as to executory contracts, 39.

executory contracts within the statute, 39.

"allowed to be good," words of the statute criticised and
construed, 10, 10, n. 3.

certain words of the English statute, 25.

language of the statute the best exponent of the intention of the
law makers, 22, 46.

poets as exponents of the law, 22.

harmony of the decisions under the statute, 24.

decisions give expression to intention, 24.

states, statute of, as to sales of goods, etc., 25, 220.

statute respects a sale, 46, 77.

statute of Iowa uses the word "delivered," 397, n. 5.

agreement of party to put his goods in condition for delivery falls
within the statute, 46, 60, 64, 64, n. 3, 65.

conditional sales generally, 333, 338.

rule as to whether a contract is within, 77, 78.

sale of marketable articles, 77, 86, 88.

statute requires more than an oral agreement to deliver, 62.

vendee must accept and receive, 283, n. 2, 287.

agreement for a mechanical construction, not within, 106.

nor where work and labor is done and materials furnished, 77,
95.

where the labor is an incident, it is a sale, 32, 182, 187, 192, 250,
252.

otherwise, if not properly a subject of sale, 73.

Towers v. Osborne, considered good law, 77.

Lord Loughborough's opinion of that case, 77.

articles in existence, statute applies, 31.

relates to contracts for the actual sale of goods, 80.

of goods *in solido*, 77.

construction of contracts in the states, 30.

statute of some states assumes the goods to be in actual existence,
77, 103.

what acts will bring case within the statute, 41.

STATUTE OF FRAUDS — continued.

- statute never construed to effect fraud, 308.
- conflict of authority as to what contracts are within statute, 88.
- “sale of any goods,” words construed, 103.
- elements, proportion of, composing the chattel immaterial, in determining whether contract within the statute, 90.
- goods to be shipped or transported, case not taken out of the statute by that fact, 84.
- even where larger price is to be paid, 85, 86.
- where goods are a part of general stock, 86.
- Garbutt *v.* Watson, enunciates the new English rule, 75, 86.
- rule of a noted case rejected, 80, 86.
- policy of early cases as to executory contracts, wrong, 80, 88.
- instance where statute held not to apply to, 81.
- Lord Mansfield’s decision, apology for, 83.
- application of the statute, rule of, 83.
- contracts to be executed at a future day, 75, 83.
- subject of surprise that executory contracts were ever decided to be without the statute, 75.
- statute does not apply where work is done for a chattel, 118.
- vendor protected by the statute in certain cases, 66.
- services may be recovered for, though contract void, 129.
- Justice Blackburn’s opinion of construction of contracts, 88.
- equity will relieve from fraud, 308.
- shares of stock*, embraced within the statute, 144, 145.
- “goods,” shares of stock are, 139, 150.
- rule in England as to, 142.
- court of chancery once held shares within, 141.
- a test case, English bench divided, 140, 140, n. 2.
- case of *Massell v. Cooke*, 141.
- leading cases in England, 139.
- shares of stock, choses in action, without the statute, 139.
- the same as to documents of title or incorporeal rights, 139.
- American decisions as to shares of stock being within the statute, 139, 142, 144, 149.
- language of the statute of different states, 139.
- intention of the statute, 144, 145.
- statute should not be narrowed by rigid construction, 145.
- consonant with common sense, 149.
- weight of authority declares shares to be within the statute, 145.
- reason and sound policy of, 144.
- variant decisions as to shares of stock being within the statute, 139.
- statute applies where several purchases are made at a given sale amounting in the aggregate to more than the amount mentioned in the statute, 235.

STATUTE OF FRAUDS—continued.

statute satisfied in cases of symbolical or constructive delivery, 254 to 332.

(See SYMBOLICAL DELIVERY.)

statute satisfied where goods are ordered on "moderate terms," 223.

where price is implied in the contract, 218, 220.

"at the time," as to payment, 371, 384.

a sale under the statute is void at the option of the parties, 206.

statute does not affect a parol license in vendee to enter upon land of the vendor to remove produce or timber, 201, 203.

of rescission of a sale, 301.

proof of a contract, and of compliance with the statute, when question arises, 446.

growing crops, *fructus industriales*, not within, 164.

(See GROWING CROPS.)

"earnest" not used in the statute of many states, 360.

statute does not condemn a sale in any case, 364.

(See EARNEST AND PART PAYMENT.)

STATUTES.

statute-books are episodes of history, 1.

foot-prints of legislation, 1.

memorials of progress, 1.

all receive judicial construction, 1.

letter of, sometimes disregarded, 1.

consist of two parts, 1.

instrumental in regulating matters of commerce, 2.

they regulate private rights, 2.

enacting words and preamble, 2. n. 2.

before time of memory, 23.

since time of memory, 23.

"new statutes," what are, 23.

what is statute law, 23.

what is the spirit of, 21.

language of, the best exponent of the intention of the law-makers, 22.

lex scripta and *lex non scripta*, 23.

construction of statutes by Lord Coke, 27.

how construed, 27.

best judges of, 27.

(See STATUTE OF FRAUDS.)

STEWART, J.

opinion of, as to contracts for the sale of growing fruit as affected by the statute of frauds, 176.

STONE, J.

opinion of, as to pleading the statute, 591.

STORY, J.

- opinion of, as to contracts for the sale of goods, 32.
- as to the place of contract, 607.

SYMBOLICAL DELIVERY.

- constructive and symbolical delivery, meaning of, 254, 254, n. 1.
- distinction between, 326.
- what is a constructive receipt, 249, 271.
- deduction from the cases, 326.
- "order," on warehouseman, 298, 331.
- "wine," delivery of, 254.
- "granite," delivery of, 254.
- ponderous articles, 254, 327.
- marking timber, effect of, 254.
- symbolical delivery*, 328.
 - statute satisfied in symbolical delivery, 326.
 - meeting of minds necessary, 326, 330.
 - rule of constructive delivery, 326, 326, n. 2, 328.
 - court to determine sufficiency of symbolical delivery, 326a.
 - jury to pass upon constructive delivery, 327.
 - verdict may be set aside by the court, when, 326a.
 - statute when satisfied in delivery of ponderous articles, 327, 328.
 - "logs in a boom," delivery of, 327, 329.
 - manual delivery, when necessary, 327, n. 3, 328.
 - "holes of brick," sale of, intermingled with different kinds, 328.
 - delivery of "one brick," effect of, 328.
 - vendee may retain whole to select the kinds bought, 328.
- Elbert, C. J., opinion of, as to symbolical delivery, 329.
 - "brick in a kiln," what will amount to delivery of, 329.
 - actual delivery, when impracticable, 329.
 - "lumber in a raft," where the vendee assumes dominion over, 329.
 - what will amount to control over goods, 329.
- "keys," delivery of, when sufficient to satisfy the statute, 330 and 330, n. 2, 332.
- case of *Gray v. Davis*, involving symbolical delivery, 330.
- keys, where vendee directs clerk of vendor to hold for him, a symbolical delivery, 330.
- constructive delivery, examples of, 330, 332.
- when delivery and acceptance conclusive, 330.
 - order on warehousemen*, effect of, 312, 331.
 - cotton, delivery of; case of *King & Clopton v. Jarman*, where cotton was sold by sample, 331.
- Eakin, J., opinion as to symbolical delivery, 331.

SYMBOLICAL DELIVERY — continued.

- when is receipt and acceptance complete under such delivery, 331.
- delivery symbolical, complete though price is not ascertained, 331.
- example of symbolical delivery when price to be ascertained, 331.
- test to determine whether goods have passed to the vendee, 331, n. 1.
- constructive acceptance and delivery must be shown to be unequivocal, 332.
- delivery of key of warehouse, sufficient, 332.
- constructive delivery, to be valid, must deprive seller of all lien, 332.
- quality and quantity, right to object to, 332.
- "sheep branded" will amount to symbolical and constructive delivery, 332, n. 1.
- jury to pass upon symbolical delivery, 332.
- (See RECEIPT AND DELIVERY.)

TELEGRAPH, CONTRACTS BY.

- a telegram, equivalent to a letter, 454.
- construed and determined in the same way, 455.
- subject-matter must be mentioned in a telegram, 457, 458.
- intent and object considered in, 454.
- meeting of minds on the subject of the contract, 461.
- telegrams, how far written evidence of a contract, depends upon circumstances, 454, 461.
- acceptance may be by circumstances, 461.
- telegrams deemed contracts in writing, by express statute of certain states, 453.
- California, statute of, as to contracts by telegraph, 453.
- Nevada, statute of, 453.
- Oregon, statute of, 453.
- Utah, statute of, on the same subject, 453.
- the telegram must contain the essentials of a contract, 454.
- a case of contract by telegraph, 455.
- "overt act," necessary, may be in various ways, 455, 461.
- of acceptance of offer, 455, 456.
- where acceptance not known until after attempted revocation, 460.
- price, must be mentioned, 454.
- and to whom goods sold, 454.
- when is a bargain struck, in contracts by telegraph, 455.
- bargain being struck, cannot be countermanded, 455.
- "was the intention manifested," is the question which arises, 455.
- what will show this, 455.

TELEGRAPH, CONTRACTS BY — continued.

case where several telegrams are involved, 456.

telegrams insufficient to make out a contract, when, 456, 458.

telegram that "goods have been sold," is not equivalent to saying that the purchaser will take the goods, 456.

case of *Watt v. Wisconsin Cranberry Company*, involving a contract by telegraph, 457.

non-delivery of a telegram, effect of, 457, 460

rules applicable to a memorandum apply to a contract by telegraph, 457, 462.

insufficient telegram, example of, 458.

case of *Trevor v. Wood*, as to a contract by telegrams and letters combined, 460.

what will amount to a consummation of the contract, 461.

letter accepting proposition by telegraph, 461.

silence deemed an acceptance, when, 461.

presumptions when parties agree to contract by telegraph, 461.

subscription, what sufficient by telegraph, 461.

where order is given by telegraph for goods, and they are shipped by usual carrier and lost, whether an acceptance, 462.

what part of the terms must be in the contract, 462.

memorandum need not be written at the time and may be on separate pieces of paper, 462.

property, telegram must show the, 462.

ambiguous telegrams will not satisfy the statute, 462.

rule of construction of telegrams, 462.

signature to the telegram.

where original is signed by the party and telegraph clerk signs the message, sufficient, 463.

an agent or clerk may sign, 463.

agents. contract by telegraph, 462.

a broker may thus make a contract for his principal, 456.

"*abbreviations*," in a telegram, may be explained, 459.

so in a memorandum or letter, 459.

parol evidence, statute disallows explanation as to subject-matter of a contract, 462.

not allowed to show connection of an unsigned paper with a signed one, 462.

memorandum or contract not made out in such case, 462.

parol proof admissible to same extent in explaining contract when made by telegraph as by letter, 459.

TENTERDEN, LORD.

his act in 9 Geo. IV., 14.

reason for the act, 219.

use of word "value," 14.

his act applies, when, 89.

TENTERDEN, LORD — continued.

- provides for executory contracts, 14, 32.
- law unsettled until this act, 66, 89.
- object of the act, 14.
- substituted word "value" for "price," 25.
- act of, and seventeenth section to be read together, 14, 219.
- no act in the United States like it, 14, n. 1.
- Lord Tenterden's ideas of construction of the statute of frauds, 21.
- Justice Talfourd's opinion of Lord Tenterden's decisions, 21, n. 1.
- "reasonable," use of the word by, 21, n. 1.
- his act declaratory of the statute of frauds in certain states, recognized, 25, n. 1.
- application of Lord Tenterden's act, 32.
- construction to be given to the statute, 76.
- when is a contract not governed by his act, 89.
- (See **AUTHORSHIP OF THE STATUTE OF FRAUDS.**)

THOMPSON, J.

- opinion of on the law of contracts by bought and sold notes, 509.

TIMBER AND TREES, GROWING.

- doctrine as to growing timber before the statute of frauds, 180.
- are standing trees rooted in the soil personalty or realty, 178.
 - contract of vendor to cut timber on his land and deliver it into cord-wood, not within the statute, 179, 182, 183, 184.
- so of cut timber, 94, 95, 179, 184.
 - parol contract valid in such cases, 179, 182.
 - verbal contract for timber, within the statute, 94.
 - "peat bed," delivery of load from, is personalty, 182.
 - "sand bank," delivery of load from, the same, 182.
 - subject-matter not existing in goods, but to be converted into that state by vendor, within the statute, 184.
 - labor bestowed in removing subject-matter the contract does not take case out of the statute, 180, 184.
- courts have experienced embarrassment in determining contracts for the sale of trees; Colt, J., opinion of, 181, 195.
- Coleridge, C. J., opinion of, on the same subject, 95.
- intention of parties largely govern in contracts for timber, 179, 181.
- interest in land not intended, when, 212.
- oral contract* for trees to be removed in a stated time construed, 180, 181, 186.
- words construed according to their relation to the subject, 181.
 - trees severed by vendee vest in him, 198, 205.
 - they are then personalty, 179, 182, 212.
 - when severed by instrument in writing, 179, 205.
 - unless trees are to remain, so as to receive growth, a contract for, is of personalty, 180.

TIMBER AND TREES, GROWING—continued.

- otherwise where they are to receive sustenance from the soil, 180.
- writing not necessary where vendor is to cut timber and deliver the same in the shape of logs, 186, 192, 212.
- oral agreement to cut railroad ties valid on delivery, 187.
- where they are delivered as the work progresses, 187.
- what will amount to a delivery, 187, 212.
- title passes as soon as delivered at place agreed, 187.
- contract within the statute where vendor agrees to furnish materials, opinion of Johnson, J., 187.
- criterion*, in such cases, 187.
- where the labor is for the vendee, 187.
- where timber is to belong to vendee as soon as severed, 187, 205.
- when title passes in such cases, 187.
- memorandum* not necessary, where A. sells trees standing on his land to B., and B. sells such trees as are not removed and still standing to A., 188.
- in contracts for sale of things attached to the soil, 212.
- possession by force of law, *eo instanti*, passes title; Le Grand, C. J., opinion of, on the subject, 188.
- statute of Maryland, construed, 188.
- cases of *Ellison v. Brigham* and *Smith v. Surman*, 183.
- where “butternut trees” are to be cut into logs, case not taken out of the statute, 183.
- trees cut into logs, not a manufacture, 183, 186.
- Pierpoint, J., opinion of, as to contracts to cut and deliver trees in a changed condition, 183.
- right to reject logs so cut, acceptance implied, when, 185.
- sale of logs in yard of third person, effect of, 185.
- cases of *Smith v. Fisher* and *Gorham v. Fisher* contrasted, 185.
- standing trees* cut into logs not a contract of sale, 186, 193.
- damages on refusal to deliver, 186.
- license* by parol, amounts to permission to do acts on another’s land without possession of any estate therein, 181.
- when in writing, conveys an incorporeal right or easement, 181.
- interest in land*, contract is. for, when vendee is to receive profit from the growing surface, 180, 181, 190, 191.
- or remain for a time in the ground, 178, 180, 204.
- surrounding circumstances govern, when, 178.
- when timber to be cut immediately, 204.
- when vendee is to cut timber on vendor’s land, an interest in land, 95, 183.
- effect of a grant of a thing, 181.
- actual receipt of price constitutes a sale of timber, 205.
- as to consideration for standing trees, 212.

TIMBER AND TREES, GROWING—continued.

case of *Banton v. Shorey*, where trees cut into knees were removed before mortgage was recorded, 212.

where mortgage was recorded before notice, 212.

contract to clear the trees and sow the land, effect of, 210.

trees raised for sale and transplantation, no part of the realty, 201.

severance in such case may be by vendee or vendor, 201.

part payment in sale of trees, 201.

nursery trees and shrubs, articles of trade, 202.

sale of goods, produce or other thing annexed to the freehold, whether severed by the vendor or vendee, under a special license, is, 203.

(See TIMBER, GROWING, TO BE SEVERED BY THE VENDEE.)

TIMBER, GROWING, TO BE SEVERED BY VENDEE.

contract to cut standing trees into logs is within the statute, 192.

where the contract is by parol, 94, 192.

“*ash bending-stuff*,” agreement to cut and deliver, at a stated price, 189.

personalty, sand from a sand bank, 182.

and “*peat*” from a peat bed, 182.

personalty and realty, contract for, on one piece of paper, 189, n. 1.

contract for personalty not vitiated by not complying with the statute relating to realty, where the two are written on one paper, 189, n. 1.

vendee, contract whereby a vendee is to enter upon land and cut and carry away timber, *at a future time*, is of an interest in land, 95, 190, 192, 194.

rule not always regarded, 190.

rule as to sale of standing trees rooted in the soil, 190.

natural growth of the soil not emblements, 194.

contract in writing, for timber, with right in vendee to remove same, 194, 206.

conflict of authority, as to sale of standing trees being realty, 194, 194, n. 1.

Bidle, J., opinion of, as to whether trees rooted in the soil are personalty or not, 194.

interest in a contract for the sale of standing trees; Ryan, C. J., opinion of, 195.

chattels personal, trees become, when actually severed, 194, 196.

immediate severance of trees, when there is to be in parol contract, 191, 206.

when time of severance indefinite, 191.

Coleridge, C. J., opinion of, on the subject, 191.

“as soon as possible,” trees to be removed, effect of, 191.

TIMBER, GROWING, TO BE SEVERED BY VENDEE—continued.

“warehouse for trees,” land is a mere warehouse where trees are to be removed immediately, 191.

rule different if trees are to derive a benefit from the soil, 191.

statute, distinctions as to whether a sale of growing trees is within, 192, 196.

action of *replevin* in the *cepit*, 196.

Paige, J., opinion of, as to unsealed contracts to convey timber, 196.

conveyance of trees and term “conveyance” defined, 196.

parol. trees annexed to the land, not virtually nor in contemplation of law, severed, cannot be sold by, 196.

so an oral contract to buy stumpage, is void, 193

of contract for “Norway logs,” of specified sizes, at agreed prices, what, 193.

writing required, 193.

case of *Wetmore v. Neuberger*, a “lumbering transaction,” action on a note given in, 193.

interest in land, contract in relation to the sale of trees, 192.

sale of basswood trees, price agreed upon, to be paid when cut and carried away; case of *Green v. Armstrong*, 192.

Beardsley, J., opinion of, as to distinction between personalty and realty in sale of standing trees, 192.

damages cannot be recovered where vendor of trees delays the work of removal; case of *Lawrence v. Smith*, 197.

Daniels, J., opinion of, as to contracts for the sale of timber, 197.

(See **TIMBER AND TREES, GROWING.**)

TIME.

“*at the time*,” payment must be made at the time of the making of the contract, 290, 367, 376, 385.

(See **EARNEST AND PART PAYMENT.**)

auctioneer must make the entry of sale in his sale-book at the time of the sale, 526, 528, 532, 581.

(See **AUCTION AND AUCTIONEERS.**)

TOMBSTONE OR MONUMENT.

a tombstone, held to be a chattel, 57.

case of *Mead v. Case*, 57.

vendor's agreement to place a tombstone in a grave-yard, does not change its character from one of sale to one of manufacture, 57.

a monument with an inscription upon it, is not a marketable thing, 56.

subject of special order, 56.

contract for a marble monument, with an inscription to be placed upon it, held to be a contract of manufacture, 54.

and takes the contract out of the statute, 54.

UTAH.

statute of Utah as to contracts by telegraph, 453.
(See TELEGRAPH, CONTRACTS BY.)

VAN HOESEN, J.

opinion of, on delivery of goods to a carrier selected by the vendor,
354.

VENDEE.

vendee has the right to inspect goods after delivery, 283.
in sale by sample, vendee must pronounce goods satisfactory, 309.
may reject goods, when, 282a.
vendor may be bailee of vendee, 262, 264, 267, 273.
vendee may have accepted although goods remain in vendor's possession, 263.
option of, to receive goods sent by carrier, 343.
vendee selling goods without inspection, tantamount to acceptance,
282.
or offers goods for sale before acceptance, 324.
goods may be selected by the vendor for the vendee, 270.
vendor may act as agent of vendee, 263.
vendee, where risk of loss is in him, is liable, 120.
vendee liable in case goods are shipped under a valid contract and
lost, 312.
if vendee fails to take goods sold at auction, vendor may sell them
and recover damages, 52.
vendee may sign a contract and broker may deliver it to vendor,
and, although different from the one delivered to the vendee, is
valid, 503.
vendee liable, when goods are shipped to him under a valid contract,
353.

VERMONT.

shares of stock within the statute, 146.

VERPLANCK, SENATOR.

opinion of, on the meaning of the word "subscribed," 474.

WAITE, J.

opinion of, as to shares of stock being within the statute of frauds,
151.

WALTON, J.

opinion of, why shares of stock are embraced within the statute of
frauds, 149.

WALWORTH, CHANCELLOR.

opinion of, upon the requirements of the statute as to signature,
474.

WILDE, J.

opinion of, as to promissory notes being within the meaning of the statute of frauds, 152.

WISCONSIN.

rule of construction of contracts in, 34.

“accept and receive,” reads the statute of frauds, 290.

rule as to acceptance, 290.

WOODRUFF, J.

opinion of, upon subsequent payment under an oral contract, 378.

WORDEN, J.

opinion of, as to pleading the statute of frauds, 592.

as to the promissory note being earnest or part payment, 390.

WORK AND LABOR.

distinction between contracts for work and labor and for goods, 30, 93.

between work and labor and a sale, 32, 66.

contract for work and labor, when, 92, 97, 106.

rule for determining what contracts are of sale and what for work and labor, 65, 96, 104.

test laid down by Pollock, C. B., 90.

his test not supported by some cases, 90.

early cases of contracts for work and labor, 74.

employment to point out the proper mode of attaining an object not within the statute, 92, 95, 97.

for the manufacture of cut nails, and damages for non-delivery of, 97.

sale of goods, where work and labor to be blended, 69, 116.

sale of lumber not of a kind usually kept, is a contract for work and labor, 127.

so a contract to change an article in form, 74.

labor and materials, contract for, 89, 106.

labor and skill, when the prime consideration, 66, 89.

contract for a mechanical construction, 106.

a case *sui generis*, *Clay v. Yates*, a contract to print a book, 89.

criterion, whether work is the essence of the contract, 89.

opinion of Justice Stephen, 89.

printer's work not within the statute, 91.

one entire work, when, 91.

where printer supplies material, 89, 91.

action and lien of the printer in such cases, 89, 91.

of a tailor's lien for work, 91.

chattel made for a party, when workman uses his own materials, 93.

may dispose of the title and maintain action for price, 93.

during progress of work no right of action vests, 93.

WORK AND LABOR—continued.

- when completed, 93.
- when not a subject of sale, 92.
- when action for goods cannot be maintained, 38.
- combined contract for work and labor, and goods sold, 67.
- “new fangled dress” made by a tailor, contract for work and labor, 67.
- an artist’s contract to deliver paintings of a novel kind, 67.
- where designs are suggested by buyer, 67.
- what contracts not within the statute, 67.
- work of art, contract for work and materials, 89.
- where materials and skill are divided, 90.
- “composition of a picture,” what, 90.
- materials of no importance, 89.
- criterion in such cases, laid down by Martin, B., 89.
- valuable citations involving cases for art work, 121.
- work and labor, cannot sue for, when, 88.
- special action on the case, when, 93.
- contract to manufacture flour, 58*a*, n. 2.
- contract of hiring, where work is to be done for vendee, 31.
- notice of completion of work, binds vendee, 99.
- title passes to vendee, when, 105.
- special order, contract to make an article under, 105.
 - where the contract is void, the party who has done the work may recover for services, 129, 131.
- case of work and labor for a chattel, 118.
 - to constitute a contract for work and labor, not necessary that the work should have been done on materials of the defendant, 93.
 - different views on the subject, 93.
 - contract for wheat unthreshed, is for work and labor, 82.
 - wheat to be cleaned before delivery not a contract for, 64.
- where vendor does work for himself in fulfilling a contract, 44, 94, 127.
- rule expressed as to contracts for work and labor, 67.
- instance of a sale, 63.
- where part of articles have been furnished, 127.

WREN, SIR CHRISTOPHER.

- reference to his architectural productions, 56.

1

2

